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Case No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CARROLL D. BESADNY, ET AL.,
Appellants,

v.

LAC COURTE OREILLES BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS, ET AL.,
Respondents.

STATE OF WISCONSIN, a sovereign state,
and SAWYER COUNTY, WISCONSIN,
Appellants,

v.

UNITED STATES OF AMERICA,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JURISDICTIONAL STATEMENT

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July 1983

QUESTIONS PRESENTED

A. Whether the decision of the United States Court of Appeals for the Seventh Circuit conflicts in principle with applicable decisions of this Court, by holding that the only rule for interpretation of a treaty is to carry out the court-perceived understanding of the Indian parties to the treaty, as evidenced by subsequent, possibly self-serving recollections, resulting in a rewriting of unambiguous terms of the treaty.

B. Whether the Court of Appeals decision conflicts in principle with applicable decisions of this Court, by holding that no presumptions are to be applied in favor of the validity of the February 6, 1850 Order of President Zachary Taylor.

C. Whether the Court of Appeals holdings as to the nature of the hunting and fishing rights reserved in the Treaties of 1837 and 1842 conflict directly with holdings of this Court, other circuit courts of appeal, and the Court of Claims.

D. Whether the Court of Appeals erred seriously in failing to give *res judicata* effect to a decision of the Court of Claims on the same questions in *Mole Lake Band, et al. v. United States*, 139 F. Supp. 938, 134 Ct. Cl. 478 (1956), *cert. den.*, 352 U.S. 892 (1956).

PARTIES

Present appellants are: Carroll D. Besadny, Secretary of the Wisconsin Department of Natural Resources ("DNR"); Thomas E. Van Roy, District Attorney of Sawyer County, Wisconsin; Ernest Lein, Sheriff of Sawyer County, Wisconsin; Milton Dieckman and Lynn Thompson, DNR County Wardens; and John McGaver, DNR Area Warden.^{1/}

In District Court, the United States sued some seventy-five individuals and corporations in *United States v. State of Wisconsin*. The only defendants and cross-appellants in the Seventh Circuit, and at present the only appellants, are the State of Wisconsin and Sawyer County, Wisconsin.

^{1/}Former parties, before various changes in office and employment, were Lester P. Voigt, Norman L. Yackel, Larry Miller, Milton Dieckman and Donald Primley. All were sued individually, in their official law enforcement capacities, and as representatives of a class.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported as *Lac Courte Oreilles Band, Etc. v. Voigt*, 700 F.2d 341 (7th Cir. 1983) (A-Ap. 1a). The opinion of the District Court is reported at 464 F. Supp. 1316 (W.D. Wis. 1978), under the name *United States v. Bouchard* (A-Ap. 53a). The *Bouchard* opinion decides the two cases at issue on this appeal, and a related federal prosecution, all involving related questions of law and fact. The *Bouchard* case was not appealed to the Court of Appeals.

JURISDICTION

The State invokes this Court's appellate jurisdiction under 28 U.S.C. sec. 1254(2), because a federal court of appeals has held a Wisconsin statute invalid. Alternatively, if this Court were to determine that it does not have appeal jurisdiction, the State invokes this Court's certiorari jurisdiction under 28 U.S.C. secs. 1254(1) and 2103. Cases supporting this Court's jurisdiction under 28 U.S.C. sec. 1254(2), on the issue of finality, include *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152, 153 (1964); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); and *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685 (1949).

STATUTES, TREATIES AND ORDER INVOLVED

28 U.S.C. sec. 1254(2), provides in relevant part:

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

....

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States. ...

The state statute attacked in the LCO Band's complaint, and upon which the State relied in part for authority to regulate off-reservation hunting and fishing by Indians, is sec. 29.09(1) Wis.Stats. (1971) (A-App. 182a). The section provides in relevant part.

29.09 Hunting, trapping, and fishing licenses. (1) Hunting, trapping or fishing without a license prohibited. Except as expressly provided, no person shall: (a) hunt any wild animal,

or (b) trap any game, or (c) take, catch or kill fish or fish for fish in inland water of this state unless a license therefor has been duly issued to him which shall be carried with him at all times while hunting, trapping or fishing as the case may be and which shall be exhibited to the department or its wardens on demand. ... Indians hunting, fishing or trapping off Indian reservation lands are subject to this chapter.

The three treaties at issue appear as Appendix B of the *Bouchard* decision, A-Ap. 150a. The Treaty of 1837, 7 Stat. 536, is at A-Ap. 150a. Article 5 provides: "The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians, during the pleasure of the President of the United States."

The Treaty of 1842, 7 Stat. 591, is at A-Ap. 156a. Article 2 states: "The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States. ..."

The Treaty of September 30, 1854, 10 Stat. 1109, is at A-Ap. 161a.

The removal order signed by President Zachary Taylor on February 6, 1850, provides:

The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the fifth article of the treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States, and the rights granted to the Chippewa Indians of the Mississippi and Lake Superior by the second article of the treaty with them of October 4th

1842, of hunting on the territory which they ceded by that treaty, with the other usual privileges of occupancy until required to remove by the President of the United States, are hereby revoked and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

Bouchard, at 1326-27; A-Ap. 67a.

STATEMENT OF THE CASE

The plaintiff-respondent Lac Courte Oreilles ("LCO") Band (hereafter, "the tribe" or "the LCO Band") commenced *LCO Band v. Voigt* in 1974 in federal district court, requesting a declaratory judgment that sec. 29.09(1) Wis. Stats. (1971), was unconstitutional because of conflict with Public Law 280, 18 U.S.C. §1162(b); the Treaty of 1837; the Treaty of 1842, and the U.S. Const. art. VI, sec. 2. The tribe asserted that the law conflicts with off-reservation hunting, fishing, trapping and gathering rights preserved to them throughout the lands ceded in the 1837 and 1842 Treaties. These lands, shown on the maps appended to the *Bouchard* decision (A-Ap. 148a-149a) comprise roughly 15 million acres in the northern two-fifths of Wisconsin. The LCO Band also sought a permanent injunction against the defendant state and county officials responsible for enforcement of natural resources laws, to prevent further enforcement of state fish and game laws against LCO Band members within the 1837 and 1842 treaty cessions. The Amended Complaint appears at A-Ap. 183a.

The United States filed *United States v. State of Wisconsin, et al.*, in 1972 to clear title to certain lands within the LCO Reservation, claiming to hold title to the lands in trust for the LCO Band.^{2/} The defendant private

^{2/}The District Court and Court of Appeals refer to the case as the *Ben Ruby* case, after the first-named defendant in the original suit.

and governmental land owners claimed that the interests of the Chippewa in the lands had been extinguished, and clear title acquired and given by the State of Wisconsin. *United States v. State of Wisconsin* was consolidated with *LCO Band v. Voigt* because the defendant State of Wisconsin cross-appealed on the same issue in both cases: the District Court's invalidation of an 1850 Presidential Order which revoked the Chippewa's off-reservation use and occupancy rights under the 1837 and 1842 Treaties. All references in this statement to the action or the parties before this Court are intended to include both cases, unless otherwise specified.

Ruling on cross-motions for summary judgment, the District Court granted summary judgment for the defendant officials (hereafter, "the State").

The Court of Appeals reversed the District Court's judgment and remanded the case for entry of judgment in favor of the plaintiffs. The appellate judgment, dated January 25, 1983, appears at A-Ap. 175a. The Court of Appeals denied the State's timely petition for rehearing on March 8, 1983 (A-Ap. 177a). The State filed a Notice of Appeal pursuant to 28 U.S.C. sec. 1254(2) in the Court of Appeals on April 27, 1983 (A-Ap. 180a). The Court of Appeals issued orders staying its mandate and extending that stay on February 16, March 17, April 20, and May 12, 1983, pending this appeal.

The District Court decision begins with a detailed statement of facts, of which the following is a substantial abridgement. The Chippewa Indians ceded their Wisconsin lands to the United States by treaties signed in 1837 and 1842. Wisconsin became a state in 1848. The first cession, by "the Chippewa nation," ceded a strip of land about 100 miles deep by 200 miles wide, extending across the state and northward from about the middle of the state, and into Minnesota. See map, A-Ap. 148a. The 1842 cession, by "the Chippewa of Lake Superior and the

Mississippi," included the remaining land between the 1837 cession and Lake Superior, and extended into what is now Michigan. See map at A-Ap. 149a. In both treaties, the Chippewa reserved rights to occupy and use the ceded territory "during the pleasure of the President" or until the President ordered them to remove. *Bouchard*, at 1323-24; A-Ap. 60a.

Congressional appropriations and contemporary governmental documents indicate that the government, in negotiating the treaties, wanted to obtain title to Indian lands and remove the Indians to lands west of the Mississippi whenever the needs of white settlers or welfare of the Indians required removal. *Bouchard*, at 1322-24, 1330-31; A-Ap. 56a-62a, 74a-79a.

The Commissioner of Indian Affairs began to seek the voluntary removal of Indians from Wisconsin in 1847, following recommendations, beginning in 1846, that the Chippewa be removed to their Minnesota lands and concentrated on defined reservations. Most of the Chippewa did not leave voluntarily. On February 6, 1850, President Zachary Taylor signed the order (quoted in full at pp. 3-4, *supra*) revoking the rights reserved under the 1837 and 1842 Treaties, and ordering the Chippewa to remove to their lands in Minnesota. *Bouchard*, at 1325-27; A-Ap. 62a-69a. Up to 3,000 Chippewa were reported removed to Minnesota, but as many as 900 remained, protesting that they had been promised that they would not have to leave Wisconsin unless certain conditions were met. The alleged conditions varied with the persons reporting them: one writer recalled the Indians as understanding that they could only be removed if they misbehaved by harrassing white settlers (*Bouchard*, at 1327-28; A-Ap. 67a-70a); other spokesmen acknowledged the Indians could be removed when the land was needed for white settlement (*Bouchard, id.*; A-Ap. 69a); others implied they had been promised they could stay for a term of

years, such as a generation. *Bouchard*, at 1328, 1329; A-Ap. 70a, 73a.

The protests of the Chippewa and certain non-Indians resulted in suspension of active removal operations in 1851. President Millard Fillmore allegedly promised that the Chippewa would be allowed to remain in Wisconsin, pursuant to one more treaty. *Bouchard*, at 1329; A-Ap. 73a-74a. That treaty was signed September 30, 1854. In it, the Chippewa ceded a portion of their Minnesota lands (*see* map, A-Ap. 149a), reserving temporary use and occupancy rights in those lands by language substantially identical to that in the earlier treaties. The treaty set apart, by metes and bounds descriptions, reservations for the bands living on Lake Superior, and authorized establishment of reservations, subject to survey and proclamation by the President, near Lac du Flambeau and Lac Courte Oreilles. In all three treaties, the United States paid for the ceded lands in annuities of money and goods, and by such devices as payment of the Indians' trader debts.

Presentation and handling of questions in lower courts. The plaintiff tribe in *LCO v. Voigt* asserted that the temporary occupancy clauses in the first two treaties authorized the President to order removal only upon a showing of serious misbehavior by the Chippewa. The plaintiff United States in *Ben Ruby* argued that removal could only be ordered after a long time, or upon a showing that the land was needed for settlement. The State argued in response that the treaties did not limit the removal power (except, perhaps, to the exercise of wise discretion), that the language and intent of the treaties were not at all ambiguous, that the intent of *both* parties had to be considered, and that imposing the limitations asserted by the tribe would result in rewriting the plain terms of the treaties. The District Court and the Court of Appeals (700 F.2d at 361) held that the Chippewa had been promised that they would not be removed "for a long

time, perhaps never," unless the Indians seriously misbehaved. *Bouchard*, at 1349; A-Ap. 118a. The Court of Appeals implicitly modified that holding when it denied the State's petition for rehearing (A-Ap. 179a). Paragraphs 6 and 7 of the denial order specify that the hunting and fishing rights apply only on public lands which have not been in private ownership, thus suggesting that white purchase and use ("settlement") of the land, at any time, extinguished the reserved hunting rights.

The State argued in both district and appellate courts that, even if the treaties gave the President only limited power to revoke and to order removal, the record showed that the judicially-implied conditions had been met. The State emphasized that an executive order is presumed valid and that the evidence must be analyzed in light of that presumption, but neither court mentioned or addressed that argument. The District Court did not state any standard for analysis of the evidence regarding the executive order. It resolved all inferences against the State, concluding that the existing evidence of "misbehavior" was not sufficient to meet the implied conditions of the two treaties. *Bouchard*, at 1349-50; A-Ap. 119a-121a. The Court of Appeals stated only that "Congress has plenary authority over Indian affairs"; that "An executive order cannot exceed the scope of the authority delegated by Congress"; and that all factual inferences must be construed in favor of the defendant state officials, since the question had been decided in favor of the plaintiff tribe, on a motion for summary judgment (700 F.2d 361; A-Ap. 42a). The Court then proceeded to resolve all inferences from the evidence of misbehavior *against* the defendant state officials. *Id.*, at 361-62.

The *Bouchard* decision (*Bouchard*, at 1347-48, 1358-61; A-Ap. 113a-118a, 139a-147a), described the nature of

the rights reserved under the 1837 and 1842 Treaties.^{3/} The different analysis ultimately adopted by the Court of Appeals was first proposed by the tribe (and opposed by the State) on appeal from the District Court.

The State first asserted that *Mole Lake Band, et al. v. United States*, 139 F. Supp. 938, 134 Ct. Cl. 478 (1956), *cert. den.*, 352 U.S. 892 (1956), (hereafter, "*Mole Lake*") was *res judicata* as to the nature of the rights reserved in the two treaties, and the effect of the 1850 order, in its Answer to the Amended Complaint. The parties did not brief the question in District Court, and the *Bouchard* opinion does not mention the *res judicata* question. The issue was raised and briefed in the Court of Appeals, and resolved in favor of the tribe.

REASONS WHY THE QUESTIONS PRESENTED ARE SO SUBSTANTIAL AS TO REQUIRE PLENARY APPELLATE CONSIDERATION.

I. The Decision Of The Seventh Circuit Court Of Appeals Conflicts In Principle With Decisions Of This Court, In Holding That The Only Rule For Interpretation Of A Treaty Is To Carry Out The Court-Perceived Understanding Of The Indian Parties, Resulting In Rewriting Plain Terms Of A Treaty.

A. Legal issues.

The decision, read as a whole, applies a rule that the only consideration in treaty interpretation is the "understanding" of the Indian parties to the treaty. This Court

^{3/}The right to live on the land will be referred to as "occupancy rights." The right to hunt, fish, trap, rice, and gather fruits of the land will be referred to as "rights of use."

has established beyond doubt that ambiguous terms, technical terms, terms reasonably susceptible of more than one interpretation, are to be construed as the Indians would have understood them. In citing the cases reiterating that principle, lower courts often drop the reference to ambiguity and simply state, e.g., "Agreements between the United States and Indian tribes are to be construed according to the probable understanding of the original tribal signatories." *Swim v. Bergland*, 696 F.2d 712, 716 (9th Cir. 1983). In that statement, the Ninth Circuit summarized this Court's statements from *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.* ("*Fishing Vessel*"), 443 U.S. 658, 675-76 (1979), which made it clear that the Indians' understanding was not conclusive, and that only *ambiguous* terms are subject to the broad construction:

A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations. ...

Accordingly, it is the intention of the *parties*, and not solely that of the superior side, that must control any attempt to interpret the treaties. ... "[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Fishing Vessel, 443 U.S. at 675-76 (emphasis added).

However, the Seventh Circuit cites the "understanding of the Indians" rule as *separate* from the rule requiring liberal interpretation of ambiguous terms. (700 F.2d at 350; A-App. 17a-19a.) The court's repeated citation to the Indians' understanding, coupled with the actual effect of the court's analyses of the three treaties, demonstrate that the Seventh Circuit is not simply resolving genuine ambiguities against the State. The court is

adhering to a single mode of analysis, to the exclusion of all other fundamental rules of treaty analysis.

As this Court states in *Fishing Vessel*, treaties are to be construed to determine the intent of *both* sides— not just the government; not just the Indians. 443 U.S. at 675-76. In reservation disestablishment cases, which are conceptually analogous to cases alleging abrogation (or “disestablishment”) of treaty rights, this Court has emphasized congressional intent:

[T]he “general rule” [that doubtful expressions are to be resolved in favor of the Indians] does not command a determination that reservation status survives in the face of congressionally manifested intent to the contrary. *DeCoteau v. District County Court* [“*DeCoteau*”] [420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975)]. In all cases, “the face of the Act,” the “surrounding circumstances,” and the “legislative history,” are to be examined with an eye towards determining what congressional intent was.

Rosebud Sioux Tribe v. Kneip (“*Rosebud*”), 430 U.S. 584, 587 (1977).

This Court has also emphasized that courts cannot ignore the clear meaning of a treaty⁴/ in order to remedy what the court considers improvidence or injustice *DeCoteau v. District County Court*, 420 U.S. 425, 447 (1975). “That would be an intrusion upon the domain committed by the Constitution to the political departments of the government.” *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900); *accord*, *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Northwestern Shoshone Indians v. United States*, 324 U.S. 335, 353, n. 17 (1945). This principle is good law today and was argued strenuously to the Seventh Circuit.

⁴/Whether the clarity arises from the plain language used or appears after examination of surrounding legislation and circumstances.

We submit that the language used in the 1837 and 1842 Treaties to define the conditional use and occupancy rights is plain and not open to the "construction" imposed on it by the lower courts. The 1837 language — "during the pleasure of the President" — is more widely used today in the employment context, regarding appointments "at the pleasure of" the appointing authority. Several state cases express the probable nineteenth century understanding of the term:

The language of the statute is that the officers named may be removed at the pleasure of the city council. These words have a well-defined legal meaning. The right to remove at pleasure is an entirely different thing from the right to remove for cause. To hold that the statute only authorized the council to remove for cause would be to deny the words used by the Legislature their ordinary meaning. This cannot be done.

London v. City of Franklin, et al., 118 Ky. 105, 80 S.W. 514 (Ky. Ct. App. 1904); *accord, Rogers v. Congleton, et al.*, 84 S.W. 521 (Ky. Ct. App. 1905); *Taylor v. Spear, et al.*, 196 Cal. 709, 238 P. 1038, 1043 (Cal. S. Ct. 1925).

The "understanding of the Chippewa," as found by the district and appellate courts, was that their reserved rights could be revoked *only for cause* — three specific causes: expiration of a "long time," serious misbehavior by the Chippewa, or white settlers' need for the land. To hold that "removal at pleasure" means "removal for cause" is not treaty construction. It is treaty rewriting. As stated in *DeCoteau*, after this Court held that Congress and the Sioux Tribe had spoken clearly in an agreement: "Some might wish they had spoken differently, but we cannot remake history." 420 U.S. at 449.

The language of the 1842 Treaty is similarly clear. The only limitation specified in art. 2 is that the President

must *order* the Chippewa to remove. Their use and occupancy rights were not to continue "until the land is needed for settlement," or until any other contingency except the President's order.^{5/} The background and legislative history of the two treaties^{6/} makes it even clearer that Congress and the persons charged with carrying out the treaties believed the language authorized removal at will. The various recommendations leading up to the removal order reflect a belief that the President need only exercise sound discretion, and they offered him a variety of reasons amply supporting removal.

If the Chippewa were promised terms exactly opposite to those in the treaty, their remedy was an action for fraud under the Indian Claims Commission Act, 25 U.S.C. 70a, 70s, 60 Stat. 1049, now 25 U.S.C. 70v. The court's rewriting of the plain terms of the 1837 and 1842 Treaties produces chaos in the analysis of post-1842 events. Congress, federal employees, the President, and the 1854 treaty commissioners relied on the earlier treaties and 1850 removal order meaning and authorizing what they said. For example, the drafter of the 1850 removal order undoubtedly assumed the Order did not have to recite any justification. *But see LCO*, 700 F.2d at 362, requiring such recitation.

The Seventh Circuit rejected the State's urging that subsequent events be analyzed from the added perspective of what the government officers thought had occurred and thought was authorized. Focusing exclusively on Indian understanding, the court violated this Court's holdings that legislation dealing with Indian affairs must be interpreted "in light of the common notions of the day and the assumptions of those who drafted them."

^{5/}Since both treaties condition removal upon Presidential action, the Seventh Circuit's footnote 14, allowing rights to be extinguished automatically either upon patenting of a parcel, or upon proof that the parcel was "needed" by whites, is enigmatic.

^{6/}Detailed at pages 1322-26 in *Bouchard*; A-Ap. 56a-67a.

Wilson v. Omaha Indian Tribe, 442 U.S. 653, 666 (1979), quoting *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978).

The intention of the 1854 Treaty to extinguish whatever off-reservation use rights might remain is clear, but must be derived more from legislative history and surrounding circumstances. The State argued extensively that the District Court's careful analysis (*Bouchard*, at 1351-52 and 1358-61; A-Ap. 122a-127a, 139a-147a), and conclusion of implied abrogation were correct. The three cession treaties reflect a purposeful pattern of land acquisition and removal of the original inhabitants from extensive contact with non-Indians. The two earlier treaties have repeated references to the Indians' eventual removal, including the President's additional power to remove Indians immediately from the "Mineral district" of the ceded lands (Art. VI, 1842 Treaty; A-Ap. 159a). The 1854 Treaty specifies that the Indians will not be required to remove from the homes being set aside for them in Wisconsin (Art. 11, 1854 Treaty; A-Ap. 167a-168a). This express statement is consistent with reported statements of the Chippewa Chief, Buffalo, that "[w]e now understand that we are selling our lands as well as the timber and that the whole, with the exception of what we shall reserve, goes to the great father forever"⁷/ and (speaking in 1852) that there was yet one more treaty to be made, "'and he hoped in making it [the Chippewa] would be more careful and wise than they had heretofore been....'"⁸/ Immediately after the express protection of the Chippewa's Wisconsin occupancy rights, the 1854 Treaty reserves off-reservation *use* and occupancy rights in the Minnesota cession (Art. 11, 1854 Treaty; A-Ap. 167a-168a). These are but limited samples of the District Court's meticulous and, we submit, correct analysis of the "plain meaning" of the 1854 Treaty.

⁷/*Bouchard*, at 1331.

⁸/*Id.*, at 1329.

In its emphasis on the Indians' understanding of the three treaties, the Seventh Circuit repeatedly resolved inferences of fact against the State. The most hotly-disputed holdings in this case — the existence of "serious misbehavior" and the ultimate intent of the parties to the treaties — are conclusions of law, or at least mixed conclusions of law and fact. *Strong v. United States*, 518 F.2d 556, 563, 207 Ct. Cl. 254 (1975), *cert. den.*, 423 U.S. 1015 (Ct. Cl. 1975). The State therefore adheres to its position that summary judgment is possible in this case, in the absence of genuine issues of material fact. There is no dispute as to the *content* of the historical documents produced by the parties. However, the State completely disagrees with the inferences the Seventh Circuit drew from the evidence on the issues of misbehavior and treaty intent. The court did not follow its declared rule that all inferences of fact are to be resolved in the favor of the party against whom summary judgment is granted. The error was compounded in the court's interpretation of the 1854 Treaty, since the Seventh Circuit was reversing the District Court's findings and judgment in favor of the State. The court considered a variety of evidence on the issue of removal, including the journal of the 1837 Treaty negotiations.^{9/} The State argued that the Indians *must* have understood, because of statements to them *and by them*, that they could not keep the lands for a term of years and would have to remove when ordered. Yet the Seventh Circuit characterized the State as presenting "no evidence" of the Indians' understanding,^{10/} and resolved all disputed inferences against the State. This is a complete misunderstanding of this Court's holdings on Indian treaty construction.

^{9/} *Bouchard*, at 1322-26; A-App. 56a-67a; LCO, 700 F. 2d at 361-62, A-App. 41a-45a.

^{10/} 700 F.2d 357.

B. Practical effect.

The effect of this ruling would be significant even if it were limited to the tribes and lands affected by the three treaties at issue. Although the Lac Courte Oreilles Band and its individual members are the only named plaintiffs in this case, the decision construes the entire treaties of 1837, 1842 and 1854. Those treaties were signed by representatives of ten Chippewa bands from Minnesota; from four bands now on six reservations, in Wisconsin; and from three bands in Michigan. As of 1981, some 7,000 tribe members were reported to reside on or adjacent to six Chippewa reservations in Wisconsin.^{11/}

The Wisconsin territory alone is estimated to cover some 15 million acres of land in which the primary source of income is tourism. The population of the area exceeds 1 million people.^{12/} Even if the decision is limited to the extensive state, federal, and county public lands, the declared off-reservation use rights have enormous impact. They compete directly with non-Indian hunting and fishing for rich and varied fish and game resources, which the State of Wisconsin has regulated for optimum recreational populations. The State would not be able to regulate treaty-protected Indian activity for that purpose. Year-round rights to hunt and fish, whether or not limited to waters and to public lands, necessarily compete with year-round use by cross-country skiers, snowmobilers, campers, hikers, picnickers, non-Indian hunters and fishers, and residents. At the risk of stating the obvious, deer hunting with the aid of modern technology involves the use of high-powered rifles, which can propel a shot for more than a mile. Wisconsin's public lands are anything but "uninhabited": they abound with camp-

^{11/}Source: United States Department of Interior, Bureau of Indian Affairs, quoted in publication of Wisconsin Department of Natural Resources, State Comprehensive Outdoor Recreation Plan 1981 (hereafter, "Outdoor Recreation Plan"), at IX-17.

^{12/}Outdoor Recreation Plan, at II-13, II-14, II-14A.

grounds, playgrounds, logging roads, and trails for hikers, cross-country skiers, and snowmobilers. Public lands are often checkerboarded with private lands, on which people reside and move about. All of these users of Wisconsin's vast natural resources accommodate themselves to the hazards of a nine-day annual gun season for deer. The Seventh Circuit's decision dramatically changes the assumptions these people must make about their own outdoor safety.

If the Seventh Circuit decision is correct in all respects, the previously listed interests may have to be subordinated to the treaty rights. However, the decision obviously reaches far beyond one Chippewa Band, on one reservation, in northern Wisconsin

If the Court of Appeals is correct in its declaration and application of rules of treaty construction, the plainest treaties may be rewritten to effect the understanding of only one party: the Indians. This is *not* a routine disagreement over the *application* of otherwise correct rules of treaty construction. No reasonable lawyer can dispute that *ambiguous* terms in a treaty — or in any contract — are to be construed against the drafter (in favor of the Indians). The Court's analysis of all three treaties and the 1850 order demonstrates that the Court does *not* limit its interpretation to ambiguous terms, and that the Court rejects this Court's proscription against rewriting plain terms of a treaty or law.

Any court could decide to apply the Seventh Circuit's incomplete and incorrect rules of analysis to any treaty. However, the danger is particularly acute in the Sixth and Eighth Circuits, since this decision ultimately affects land and parties in Minnesota and Michigan as well as Wisconsin (Maps, A-Ap. 148a-149a).

The Seventh Circuit's analysis of the 1850 removal order and the 1854 Treaty terms^{13/} illustrates the

^{13/}700 F.2d 361-65; A-Ap. 41a-52a.

absurdities that result when historical documents and events are rewritten, and subsequent events re-analyzed without considering the actors' assumptions.^{14/} Use of this decision as precedent in other jurisdictions would compound the injustices wrought by this wholesale rewriting of history.

If unknown or newly-discovered conditions can be "construed" into the plainest treaty, then subsequent orders, laws, and actions lose their logic, as the terms and events on which they were premised "vanish" by judicial fiat, and new terms appear. Rights and interests which have developed over the decades, in reliance on the apparent status quo, are in jeopardy. For example, the fish and game resources in which Wisconsin has invested millions of dollars, and upon which thousands of people depend for their livelihood and recreation, may decline substantially as a tourist or recreation attraction. Few tourists will be interested in competing with several thousand Chippewa, who can potentially hunt and fish the resources down to barely self-sustaining levels.

II. The Decision Conflicts In Principle With Decisions Of This Court, In Denying Any Presumption Of Validity To Orders Of The President And In Construing Validity of The Order Only As The Indians Understood It.

A. *Legal issues.*

Assuming this Court does not reverse the lower court's introduction of additional terms into the 1837 and 1842 Treaties, the question then arises whether the record

^{14/}The Court states pointedly, for example, that the President's removal order does not refer to any misbehavior, and that the 1854 Treaty does not expressly revoke the off-reservation use rights. Both actions would have been superfluous under the drafters' beliefs that: (1) the President had unlimited power to order removal; and (2) the use rights had been revoked in 1850 and had not been revived as of 1854.

supports the 1850 order on the matter of Indian misbehavior. Given the variety of documents addressing the removal question between 1842 and 1854, the assumptions underlying the court's analysis are critical. As in its analyses of the three treaties, the Seventh Circuit's only apparent analytical premise is to give effect to the understanding of the Indians.^{15/}

That fundamental premise unavoidably conflicts with this Court's holdings that "the strongest of presumptions and the widest latitude of judicial interpretation" support an executive order pursuant to an act of Congress. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952). Canons of statutory construction apply to construction of executive orders. *United States v. Chemical Foundation*, 272 U.S. 1, 13-14 (1926). A party challenging the validity of an order must thus prove it invalid beyond a reasonable doubt if he or she is to overcome the presumption of constitutionality. *Pacific States Box & Basket Co. v. White*, 296 U.S. 176, 185, 186 (1935). The Court's chosen analysis also conflicts with its own stated rule, that competing inferences in the evidence are to be resolved in favor of (in this case) the State. The briefest examination of the evidence listed in *Bouchard* (*Bouchard*, at 1324-26; A-Ap. 60a-67a), reveals that *there was evidence* of Indian misbehavior in the record. *See*, for example, the 1846 Commissioner of Indian Affairs report of depredations by drunken Indians; the 1847 report of two violent incidents; the 1849 report referring to depredations; and the Minnesota legislature's official expression of concern for the "security and tranquility" of white settlements. *Id.* The presumptions applied to this evidence are critical.

^{15/}The Court properly stated that an executive order is invalid if it exceeds its Congressional authorization (700 F.2d at 361, A-Ap. 41a). However, the Court's placement of the maximum at the beginning of its analysis suggests prejudgment on the *ultra vires* question.

If the Court had correctly employed *any* presumptions in favor of the validity of the 1850 Order, it would almost certainly have considered the Executive Branch's apparent assumptions that the President had unlimited power under the two treaties. The variety of reasons supporting removal in the record, including Congress' repeatedly announced desire to acquire Indian lands east of the Mississippi and move the Indians westward, made the 1850 Order a most reasonable exercise of Presidential discretion.

B. Practical effect.

Indian treaties commonly authorized the President to take a variety of actions, from placement of other tribes on a particular tribe's reservation,^{16/} to definition of reservation boundaries,^{17/} to termination of temporary or conditional rights,^{18/} and others.^{19/} Such executive orders often formed the basis for other orders, agreements, or legislation. Invalidation of the orders, and consequent undermining of later actions, is especially likely where, as here, a court imposes limitations on the President's authority which were unknown to him at the time.

III. The Decision Conflicts In Principle with Decisions Of This Court And Other Circuits As To The Nature And Abrogation Of The Reserved Rights.

^{16/}Treaty of February 8, 1831, with the Menominee, 7 Stat. 342.

^{17/}Treaty of January 14, 1846, with the Kansa, 9 Stat. 842.

^{18/}Treaty of November 29, 1854 with the Umpqua, 10 Stat. 1125; Treaty of October 18, 1848 with Menominee, 9 Stat. 952.

^{19/}Treaty of July 31, 1855, with the Ottawa and Chippewa, 11 Stat. 621.

If the lower courts' invalidation of the 1850 removal order stands, then one must consider whether the Chippewa implicitly relinquished their off-reservation rights when they signed the 1854 Treaty. The District Court held that they did.²⁰ The Court of Appeals reversed, resolving all inferences from the evidence in favor of the tribe, and ordered entry of summary judgment for the plaintiff tribe.

Judicial analyses of the nature of Indian rights of use and occupation can easily become confusing and inconsistent, due in part to the danger of relying on just two or three categories to cover a multitude of phenomena. The Seventh Circuit's analysis compounds the confusion inherent in the subject, especially when the Court quotes correct legal principles throughout its analysis, but applies them inappropriately. In short, what the court said is not what it did.

The following premises evolve from the Seventh Circuit's analysis, taken in its entirety:

1. The court seems to believe that there are only two basic kinds of Indian rights: "aboriginal" and "treaty-recognized." *How* the treaty defines or limits the right is irrelevant.

2. The "permissive" use and occupancy rights described by the District Court (*Bouchard*, at 1348; A-*Ap.* 117a-118a) must, according to the Seventh Circuit, be the same as "aboriginal" rights, which are not "legal rights" at all; are unenforceable; and may be extinguished by implication and without compensation.

3. "Treaty-recognized" rights, according to the court, cannot be extinguished without subjecting the

²⁰/*Bouchard*, 1351-52, 1358-61; A-*Ap.* 122a-127a, 139a-147a.

United States to a claim for compensation, and cannot be extinguished by implication.^{21/}

4. The Seventh Circuit generalizes the very special facts and treaty of *United States v. Winans*, 198 U.S. 371 (1905), to all cases involving treaty-reserved rights of use, concluding, apparently, that treaty-recognized rights of use are intrinsically independent of title and right of permanent occupancy. 700 F.2d at 352, citing *Fishing Vessel, supra*, a case involving the same distinctive group of tribes, treaties, and historical traditions as in *Winans*. The court further suggests that "treaty-recognized rights of use" are somehow superior to treaty-recognized title or rights of permanent occupancy.^{22/}

5. The Seventh Circuit's footnote 14, added on March 8, 1983, when the court denied the State's petition for rehearing, presents the final enigma in the court's analysis.^{23/} Although the rights reserved in the 1837 and

^{21/}The court's handling of implied abrogation is particularly confusing, because the court quotes the correct standard — that abrogation must be express *or be clear* from the surrounding circumstances and history—so often. However, the Seventh Circuit states outright, at pages 356 and 365, that legally enforceable or treaty-recognized rights cannot be extinguished by implication. Throughout its discussion, it suggests—and mistakenly characterized the state as arguing—that only aboriginal or "permissive" rights can be extinguished by implication. *E.g.*, page 355, "The defendants strenuously urge that *because* the LCO's treaty-reserved ... rights were 'temporary,' they could be extinguished by implication" (emphasis added).

^{22/}700 F.2d at 356: "The term 'permissive occupation' is especially inapplicable, however, to the LCO case which involves the reservation of usufructuary rights rather than a claim of title." *Id.*, at 358: "If the LCO case involved a property interest that by its very nature contemplated permanence, such as title, the argument of the defendants would be more persuasive."

^{23/}After observing that the LCO Band appeared to limit its claim to those portions of the ceded lands which have not passed into private

1842 Treaties were expressly conditioned only upon action by, or the "pleasure of," the President, the court seems to hold that some of the use rights *were* extinguished implicitly, presumably when the land was patented to private owners.

The State argued in the Court of Appeals, and maintains here, that the District Court's scholarly analysis of the nature of the reserved rights and the effect of the 1854 Treaty was correct, if its invalidation of the 1850 Executive Order stands. The State admitted (Court of Appeals Brief, at 37), without conceding the precedent to be binding, that the Indian Claims Commission had held that the 1825 Treaty of Prairie du Chien, 7 Stat. 272, recognized Chippewa title to the area ceded in 1837.²⁴ That holding is irrelevant to this case, the State argued, because whatever the nature of the Chippewa title was before 1837, the Chippewa ceded all of their interests in 1837 and 1842, except those expressly reserved. The State then acknowledged (Court of Appeals Brief, at 38) that the rights at issue were indeed defined — "recognized," if you will — in the two treaties, concluding: "Those reserved rights were clearly treaty-recognized and clearly 'permissive.'" *Id.* The Seventh Circuit's overall analysis makes it clear that the court would have held the reserved rights to be "treaty-recognized," whether or not it believed the State to have conceded the issue.

The Seventh Circuit's holdings on the nature and abrogation of the reserved rights conflict with holdings of this Court and other Courts of Appeals. When the Court of Appeals reiterates that "permissive" rights

ownership, the court holds that any broader claim, such as the right to hunt and fish on private land which is utilized for hunting and fishing, "is inconsistent with the Indians' understanding at the time of the cession treaties that their rights could be limited if the land were needed for white settlement...." 700 F.2d at 365, n. 14.

²⁴ *Minnesota Chippewa Tribe v. United States*, 19 Ind. Cl. Comm. 514, 525-26 (1968).

must be the same as "aboriginal" rights, the court completely ignores the considerable diversity in the methods by which treaties have defined Indian use and occupancy rights. See Felix Cohen, *Handbook of Federal Indian Law*, (University of New Mexico Press 1970, at 290-94, 295). All Indian rights are *not* divided into two parts. Methods of classification necessarily vary with the objects of the particular lawsuit. This suit is *not* concerned with compensation for the 1837 and 1842 cessions, nor is the State asserting that the reserved rights could be extinguished in 1854 by anything less than a strong, clear showing of intent to extinguish. The court's preoccupation with the "aboriginal" and "treaty-recognized" labels is thus misleading, in this case.

The District Court added the critical element which the Court of Appeals omitted from its definition of "treaty-recognized rights." "Another kind of Indian title to lands is 'recognized' or 'treaty' title, defined as an acknowledgment by the United States that the Indians have a legal right *permanently* to occupy and use a certain tract" (*Bouchard*, 1347, emphasis added; A-App. 114a-115a). The District Court admittedly spoke in terms of title and occupancy as well as use. However, all of the careful, definitive discussions of "recognized" versus "aboriginal" rights require *permanence* as an element of "recognized" rights. See, for example, *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79 (1955); *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 911 (Ct. Cl. 1963). The Chippewa rights in this case were treaty-defined, but were never understood to be permanent.

The "treaty-recognized" label is crucial to the Seventh Circuit's analysis, because of the court's underlying conviction that "treaty-recognized" rights cannot be extinguished by implication. The label should be irrelevant, because this Court has held that even a "permanent" reservation, established by treaty, can be dis-

established by implication, upon a sufficiently strong showing of intent. *Mattz v. Arnett*, 412 U.S. 481, 505 (1973). This Court has likewise taken great care to avoid unintentional abrogation of Indian rights labelled "aboriginal." See *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 1388, 206 Ct. Cl. 649 (1975), and other authorities quoted in *Bouchard* at 1351 and 1347-48; A-App. 122a-124a, 114a-117a. Thus, the Chippewa's reserved rights could be implicitly relinquished in 1854, whatever their label, provided the parties' understanding to that effect is clear.

The Eighth Circuit Court of Appeals, the Minnesota Supreme Court, and the California Supreme Court have explicitly rejected Indian claims, based on *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), the takings of treaty-recognized title must be explicit. See *United States v. State of Minn.*, 466 F. Supp. 1382, 1385 (D. Minn. 1979), *aff'd and adopted*, *Red Lake Band of Chippewa Indians v. State of Minnesota*, 614 F.2d 1161 (8th Cir. 1980), *cert. den.*, 449 U.S. 905 (1981); *State v. Keezer*, 292 N.W.2d 714, 720 (Minn. S. Ct. 1980), *cert. den.*, 450 U.S. 1389 (1981); *In re Wilson*, 634 P.2d 363, 369 (Cal. S. Ct. 1981). The Seventh Circuit acknowledges that *Menominee* is not controlling in that respect (700 F.2d at 354), but persists in its indications that "treaty-recognized" rights cannot be implicitly abrogated or relinquished.^{25/}

The United States would not be subject to a claim for compensation if the reserved rights were found to be relinquished in 1854, because the United States was

^{25/} A scholarly survey of Indian treaty abrogation urges that treaty rights only be abrogated by express Congressional statement, "both of the specific promises about to be broken and of the intent of Congress to break them." See Wilkinson and Volkman, *Judicial Review of Indian Treaty Abrogation*, 63 Cal. L. R. 601, 660-1 (1975). The writers' survey of existing law reveals that the Seventh Circuit's unconditional denials of implied abrogation are not the law at this time.

already paying the Chippewa, in the 1837 and 1842 annuities, for their entire title to their Wisconsin lands. See *Bouchard* analysis, at 1337 and 1348; A-Ap. 90a-93a, 116a-118a.

The Seventh Circuit's holding that rights of use are intrinsically independent of rights of title and permanent occupancy (700 F.2d at 352) conflicts with holdings of the Eighth Circuit, in cases far more analogous than *Winans* and *Fishing Vessel*. See *United States v. Minnesota*, *supra*, 466 F. Supp. 1382, 1385, holding that hunting and fishing rights are mere incidents of the Indian right of occupancy. *Accord, Sac and Fox Tribes of Miss. in Iowa v. Licklider*, 576 F.2d 145, 151 (8th Cir. 1978); *In re Wilson*, *supra*, 634 P.2d at 368.

Ironically, the Seventh Circuit's attempt to extend the *Winans* facts and treaty terms to this case nullifies the plain language of the 1842 Treaty, which defines the reserved rights as "the right of hunting on the ceded territory, with the *other usual privileges of occupancy....*" (*Bouchard*, at 1367, emphasis added; A-Ap. 157a.) The District Court's analysis of all the evidence linking use with occupancy in this case (*Bouchard*, at 1358-61; A-Ap. 139a-147a), further reinforces the parties' express definition of the use rights as incidental to the right of occupancy.

Given the Eighth Circuit's analysis of use rights as incidents of occupancy, conflict between the Seventh and Eighth Circuit is almost certain to result. The Minnesota Chippewa who were parties to the Wisconsin treaties will undoubtedly seek to apply this holding to the 1837 and 1854 cessions in Minnesota (see Map, A-Ap. 149a).

The Seventh Circuit holding, if followed in other jurisdictions, would jeopardize long-accepted interpretations of cession treaties, which relied on the rule that cession of title includes rights incidental to title.

IV. The Court Of Appeals Erred Seriously In Denying *Res Judicata* Effect To The Court Of Claims Rulings In *Mole Lake, Et Al. v. United States*.

This case is not the first time courts have considered competing interests of the United States, the Lac Courte Oreilles Band, and the State of Wisconsin, in the LCO Reservation, under the three Wisconsin treaties and 1850 executive order. In 1956, the Court of Claims decided, and this Court refused to review, 16 years of litigation concerning conflicting claims to swamplands within various Chippewa reservations, including the LCO.²⁶ Unlike the present case, the plaintiff tribes had sued the United States for failing to give the tribes good title to swamplands within their reservations, alleging that the lands passed to Wisconsin in September 1850 under the Swamp Lands Act, 9 Stat. 519. The United States denied Wisconsin's title, alleging that the Chippewa had never vacated the disputed lands and therefore had never lost their rights to them. The government also argued that the 1854 Treaty permanently relinquished the power of removal reserved to the President in the 1837 and 1842 Treaties.

As described by the Court of Claims, "since the alleged conflicting rights of the State of Wisconsin *were an important element* in the plaintiffs' case," the State had to be notified promptly of the proceeding, 139 F. Supp. at 939 (emphasis added). The State intervened, challenging the court's jurisdiction, but also claiming ownership of the swamplands and damages for deprivation of proceeds from the land.

The Court of Appeals in the present case held that Wisconsin was not a true party to *Mole Lake* and that the

²⁶ *Mole Lake Band, et al. v. United States, et al.*, 139 F. Supp. 938, 134 Cl. Cl. 478 (1956), cert. den., 352 U.S. 892 (1956) (hereafter, "*Mole Lake*").

State's claims were not necessary to the Court of Claims' final holding.^{27/}

That holding is contradicted by the reported Court of Claims decision and by the slip opinion and detailed findings of the Indian Claims Commission.^{28/}

When the Court of Claims declined to consider Wisconsin's "petition or its prayer for relief,"^{29/} it was declining to consider whether title to the LCO swamp-lands was in the State and whether the State should have judgment for damages against the United States. The court ultimately held that all of the plaintiff bands (except the Lac du Flambeau) had retained the use of and proceeds from their reservation swamplands. *Id.* If they had not, the United States would have been liable to them under the 1854 Treaty, regardless of who owned the swamplands.

However, the Court of Claims noted, even in its very abbreviated reported decision, that Wisconsin's participation in the case had been "helpful and instructive to the court." *Id.* More important, the Court saw fit to make specific findings and rulings on: (1) the nature of the rights the Chippewa reserved in the 1837 and 1842 Treaties, and (2) the revocation of those rights by the 1850 removal order. The Chippewa held "only a revocable license to use the land" under the 1837 and 1842 Treaties, until the President required them to vacate (139 F. Supp. at 940). In September of 1850, seven months after the removal order, the swamplands in the LCO Reservation area were "public land of the United States." *Id.* The lands could not have been "public" if the Chippewa had retained any significant legal interest in them.

^{27/}See discussion at 700 F.2d 359-60; A-App. 37a-41a.

^{28/}The reported and unreported decisions were before the Court of Appeals in this case as R. Items 30-31 in the companion case of *State of Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983), *pet. cert.* filed April 1983.

^{29/}139 F. Supp. at 941.

In the unreported opinion and findings, exceeding 100 pages, the Commission stated, "Whether (and if so, when and how) Indian title to the lands here in controversy has been extinguished is one of the issues in this case" (Slip op., at 14, fn. 7; *Baker*, R. Item 30-31). The Court held, as did the District Court in this case, that the 1837 and 1842 Treaties were intended, by both parties, to convey to the United States Indian title to the lands (Slip op., Finding #119(a) and (b)). Against the United States' claim that the 1850 order was invalid because not all the Chippewa obeyed it, the Court and Commission held that the order did revoke the temporary rights, leaving the swamplands "public lands" in September, 1850 (Finding 119(c); 139 F. Supp. at 939-40).

The validity of the 1850 order, and the nature of the rights of use and occupancy, should not even be at issue now. This Court should give full consideration to the question of a prior decision of the Court of Claims, binding all three parties to the present appeal.

CONCLUSION

For all the foregoing reasons, this Court should give plenary consideration to this appeal, or treat it as a petition for writ of certiorari and grant the petition.

Respectfully submitted,

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July, 1983

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[700 F.2d 341]

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS, et al.,
Plaintiffs-Appellants, Cross-Appellees,

v.

Lester P. VOIGT, et al.,
Defendants-Appellees, Cross-Appellants.

UNITED STATES of America
Plaintiff-Cross-Appellee,

v.

STATE OF WISCONSIN, a sovereign state,
and Sawyer County, Wisconsin,
Defendants-Cross Appellants.

Nos. 78-2398, 78-2443 and 79-1014.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 14, 1982.

Decided Jan. 25, 1983.

As Amended on Denial of Rehearing and
Rehearing En Banc March 8, 1983.

[700 F.2d 343]

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cross-appellants.

Before CUMMINGS, Chief Judge, WEICK, Senior Circuit Judge,* and PELL, Circuit Judge.

The principal case on this consolidated appeal, *Lac Courte Oreilles Band v. Voight (LCO)* was an action for a declaratory judgment that a band of Lake Superior Chippewa Indians (LCO band) has retained treaty-reserved off-reservation hunting, fishing, trapping and gathering rights, collectively termed "usufructuary rights," in public lands in the northern third of Wisconsin and that such rights preclude State regulation. The defendants in *LCO* are primarily State officials who are being sued in both their individual and representative capacities. On cross-motions for summary judgment, the district court granted the defendants' motion, reasoning that the Indians' usufructuary rights were released or extinguished by the Treaty of September 30, 1854 (Treaty of 1854).¹ In reaching this conclusion, the district judge expressly rejected the State's contention that the usufructuary rights had been revoked by the Executive Order of February 6, 1850 (Removal Order of 1850).

United States v. Wisconsin & Sawyer County (Ben Ruby), which has been consolidated with *LCO* for purposes of appeal, similarly involved a determination by the district judge, on cross-motions for summary judgment, that the Removal Order of 1850 was invalid. The State has cross-appealed the district court's holding pertaining to the Removal Order of 1850 in both *LCO* and *Ben Ruby*.²

*Paul C. Weick, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

¹Because of the district judge's conclusion that the Indians' usufructuary rights were released or extinguished in 1854, his disposition of *LCO* does not reach the issue of what regulations the State might impose on the Indian's usufructuary activities if those rights were still in force.

²The United States dismissed its own appeal from the *Ben Ruby* decision and the *LCO* band did not move to intervene to protect its interests on the cross-appeal in *Ben Ruby*.

LCO and *Ben Ruby* were decided by the district court, together with a third Indian rights case that is not involved in this appeal. The cases are reported as *United States v. Bouchard*, 464 F.Supp. 1316 (W.D. Wis.1978).

The three principal issues presented by *LCO* and *Ben Ruby* are:

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(1) what was the nature of the usufructuary rights enjoyed by the LCO band pursuant to the treaties of 1837 and 1842;

(2) whether those rights were extinguished by the Removal Order of 1850; and if not,

(3) whether those rights were released or extinguished by the Treaty of 1854.

I. FACTS

Because one of the subsidiary issues in these cases is whether they were appropriate for resolution by summary judgment, a rather detailed recitation of the evidence before the district court is required.

The LCO band was one of many bands of Chippewa Indians who lived in areas of northern Wisconsin, the Upper Peninsula of Michigan, and northeastern Minnesota. Together with several other bands, the LCO band was referred to as "Lake Superior Chippewas." The Chippewa bands subsisted mainly by hunting, fishing, trapping, harvesting wild rice, making maple sugar, and engaging in various gathering activities.

During at least the first half of the nineteenth century, the policy of the federal Government was to buy Indian lands where white settlement was anticipated and to provide for removal of the Indians to lands farther west. This is called the "removal policy."

In 1837, Wisconsin Territorial Governor Henry Dodge was authorized to negotiate a treaty with the Chippewas for the purchase of land in northern Wisconsin, just south of the Lake Superior basin. On March 3, 1837, Congress appropriated \$10,000 for "holding treaties with the various tribes of Indians east of the Mississippi River, for the cession of lands held by them ... and for their removal west of the Mississippi." 5 Stat. 158, 161. On May 13, 1837, the Office of Indian Affairs wrote Treaty Commissioner Dodge concerning the Government's purposes in seeking a treaty at that time. The letter indicated that the land was valuable for its pine timber and that acquisition by the United States would open the territory for white settlement.

A treaty council was held. According to the notes of Verplanck Van Antwerp, secretary of the council, Commissioner Dodge told the assembled Indian chiefs in July 1837 that the Government wished to buy a portion of their land that was barren of game and not suited for agriculture. Dodge described the land sought as "abound[ing] in pine timber, for which their Great Father the President of the United States wished to buy it from them, for the use of his white children." The Indians responded that they wanted to be able to continue their gathering and hunting activities on the lands, that they wished annuities for sixty years, after which their grandchildren could negotiate for themselves, and that they desired provisions for the half-breeds and traders. Governor Dodge pointed out to the Indians that the "Great Father" never buys lands for a term of years, but that he would agree on behalf of the President to grant the Indians the "free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States during his pleasure."

The following day the Indians reiterated, through their spokesman Aish-ke-bo-gi-ko-she, that they wished to reserve the privilege of using the land for gathering,

hunting, and fishing activities. They said that they could not live, deprived of these means of sustenance. Commissioner Dodge replied, in part: "I will make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years before your Great Father will want all these lands for the use of his White Children."³

The Treaty of 1837, which was signed by a Lac Courte Oreilles chief, among others, embodied these understandings. Article 1

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of that Treaty states that the Chippewas "cede to the United States all that tract of country" described in the article. The United States agreed to pay annuities to the Indians, to distribute money to the half-breeds, and to pay some Indian debts. Article 5 of the Treaty states:

The privilege of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians during the pleasure of the President of the United States.

In 1841, Congress appropriated \$5,000 for the expenses of negotiating a treaty to extinguish Indian title to lands in Michigan, a portion of which was held by the Chippewa bands. In July 1842, Robert Stuart, Superintendent of the Michigan Indian Agency wrote to the Secretary of War. He stated that, subsequent to the 1841 appropriation, it had been learned that the mineral district Congress wished to acquire extended beyond

³The land ceded to the United States by the Treaty of 1837 is illustrated in Appendix A to the district court opinion, at 464 F. Supp. 1316, 1362-63 (W.D. Wis. 1978). The present Lac Courte Oreilles reservation is within the ceded territory.

northern Michigan into Wisconsin. He recommended purchase of the Wisconsin as well as the Michigan land, stating that "the main importance of immediately acquiring this territory, is owing to its supposed great mineral productivity." He noted that it would not be necessary to remove the Indians from the land until the land was required for white settlement. A month later, Stuart was appointed commissioner to negotiate the proposed treaty with the Chippewas. His instructions stressed the importance of gaining the mineral lands and acquiring control over the south shore of Lake Superior. He was told that general removal of the Indians from the territory would not occur for "considerable time."

Stuart reported the outcome of his negotiations with the Chippewas in an annual report to the Bureau of Indian Affairs dated October 28, 1841. He noted the importance of the mineral deposits on the land and indicated that the concluded treaty had arranged a sharing of annuities between the Lake Superior tribes and the Mississippi tribes. This sharing was necessary to end a feud that had developed between the tribes after the 1837 treaty.

The 1842 treaty included a cession of land north of that ceded in 1837.⁴ Article II of the Treaty of 1842 stated:

The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

The December 5, 1842, report on the treaty by the Commissioner of Indian Affairs to the Secretary of War

⁴See Appendix A to district court disposition, 464 F.Supp. 1316, 1362-63 (W.D.Wis.1978).

stressed the importance of acquiring the minerals and of commanding the south shore of Lake Superior. A report by the Superintendent of the Wisconsin Indians to the Commissioner of Indian Affairs the following year noted that exclusive possession of the Lake Superior shore would be commercially important, especially as settlements and mineral trade expanded.

Copper mining along the south shore of Lake Superior, as well as white settlement on the ceded areas, increased greatly following the Treaty. As early as 1846, the Commissioner of Indian Affairs again suggested that the Chippewas be removed to land set apart for them west of the Mississippi. The reports of the period indicate that the Commissioner envisioned "improvement of the Indian race" by decreasing their reliance on traditional activities such as hunting and fishing and by compelling them to "resort to agriculture and other pursuits of civilized life." The fact that whites were selling whiskey to the Indians was seen as another reason for removal.

During the summer of 1847, two Government agents attempted to secure Chippewa agreement to a plan of resettlement. They were unsuccessful. In 1847, the Commissioner of Indian Affairs again suggested that resettlement was desirable. His report did not mention conflicts between the Indians and whites. The LaPointe subagent

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was more specific. He recorded two incidents of violence between the Chippewas and white settlers. In one, an Indian was acquitted of a murder charge on the ground of self-defense. In the other, the investigating agent concluded that the whites were at fault. The Commissioner wrote:

I fear, that in our accounts of outrages and crime, we have done the Chippewas, if no other

tribe, injustice in many cases; for I find on comparing them with almost any civilized community of the same size, for four years, there will be found the smaller aggregate of crime on the part of the savage; and every crime of any magnitude which has been committed may be traced to the influence of the white man.

In his 1848 Report, the Commissioner noted that, although most other Wisconsin tribes had been removed, the Chippewas remained in Wisconsin. The Commissioner stressed the desirability of "civilizing" the Indians by requiring them to settle on smaller grounds where they would have to rely on agriculture. No conflicts between Indians and whites were reported.

The 1849 Report of the Commissioner of Indian Affairs again repeated the reasons for removal stressed in earlier years. Additionally, he referred to white "citizens who suffer annoyance and loss from depredations." The report of the LaPointe subagent for 1849 had specifically addressed this problem and had concluded that the sale of whiskey by the whites to the Indians was causing the most difficulty. The subagent acknowledged that it was possible the Indians were punished for acts they committed whereas whites who committed similar acts went free.

In 1849, the Lake Superior Chippewas petitioned Congress for twenty-four sections of land at "LaCotore" and at "LaPoint." They indicated that they wanted the land for permanent cultivation and permanent homes. Further, in October of that year, the Legislative Assembly of the Minnesota Territory requested the President to remove the Chippewas to another unsettled area.

At the urging of the Commissioner of Indian Affairs and the Secretary of the Interior, the President issued an executive order on February 6, 1850. This Order stated in relevant part:

The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the fifth article of the treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded" by the treaty to the United States, and the rights granted to the Chippewa Indians of the Mississippi and Lake Superior by the second article of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, with the other usual privileges of occupancy until required to remove by the President of the United States, are hereby revoked and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

The Indians were surprised and dismayed by the order. Benjamin Armstrong, a trader who lived in Chippewa territory and reported in a book his experiences with the Indians wrote:

No conversation that was held [during the 1842 treaty negotiations] gave the Indians an inkling or caused them to mistrust that they were ceding away their lands, but supposed that they were simply selling the pine and minerals, as they had in the treaty, of 1837, and when they were told in 1849, to move on and thereby abandon their burying grounds — the dearest thing to an Indian known — they began to hold councils and to ask each as to how they had understood the treaties, and all understood them the same, that was: that they were never to be disturbed if they behaved themselves.

B.G. Armstrong, *Early Life Among the Indians* 12 (1892). Armstrong also reported that the Indians' attempts thereafter to learn of any depredations which could have

been the cause of removal were unsuccessful. In short, the Indians believed they would not be removed unless they misbe-

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haved and they found no evidence of misbehavior.

This understanding was repeated in a letter written to the white settlers in Minnesota by a Chippewa chief in 1850. He stated that the treaty commissioner had told the Indians in 1842 that they would not be removed for at least 20 years and probably never. The chief indicated that the treaty had been signed on the reliance that it was only the copper on the land that was sought by the United States. A letter written January 21, 1851, from the Secretary of the American Board of Commissioners for Foreign Missions informed the Commissioner of Indian Affairs that the Indians had been told they could remain where they were for an indefinite period, "except so far as they might be required to give place to miners; and the Commissioner said to them: 'You and I shall never see the day when your Great Father will ask you to remove.'" The Secretary indicated that, absent that promise, the treaty would never have been signed. The Secretary's version of the treaty was corroborated by several sources including C. Mendenhall, a miner who wrote to the Commissioner of Indian Affairs on January 6, 1851, W.W. Warren, a farmer who was employed by the Government to teach farming to the Indians, and Indian Agent Henry Gilbert in his 1853 report to the Commissioner of Indian Affairs.

A further effort to effect removal to the western lands was made in 1850 by changing the place for payment of the Chippewas' annuities from LaPointe to Sandy Lake in the Minnesota Territory. The trip resulted in the death of many Indians. The following February 1851, subagent Watrous suggested paying the annuities in early spring

and late fall in the Minnesota Territory. He hoped that this would be more effective in inducing the Indians to stay at Sandy Lake. Watrous was subsequently appointed superintendent of removal.

On August 24, 1851, Indian Commissioner Lea of the Office of Indian Affairs advised Watrous by telegram to "Suspend action with reference to the removal of Lake Superior Chippewas for further orders." On September 5, 1851, Lea confirmed that the suspension had been ordered by the Secretary of the Interior, pending the President's decision as to whether the Indians would be permitted to remain on their lands.

Also in September 1851, Assistant Superintendent Boutwell reported to the Minnesota Territorial Governor concerning the problems encountered in trying to effect removal of the Chippewas. Boutwell reported that a compromise had been achieved concerning the place for payment of annuities and indicated that, despite the telegram suspending removal operations, "as the Indians are ready to go I shall start them."

On September 20, 1851, Watrous reported to the Territorial Governor that 900 Chippewas remained on the ceded lands. He expressed apprehension that those who had been removed would return. These observations were reported to the Commissioner of Indian Affairs in Superintendent Ramsey's annual report dated November 27, 1851.

In the meantime, Chippewa Chief Buffalo had written the Commissioner on November 6, 1851, complaining about the hardship caused by the removal attempts and particularly the designation of where the annuities were paid. He requested that all future payments be made at LaPointe.

The Indians were dissatisfied with the provisions given them during the winter of 1851. On April 5, 1852, a

group of Chiefs went to Washington to see the President. They were accompanied by Benjamin Armstrong who subsequently reported much that transpired. According to Armstrong, on June 12, 1852, Chief Buffalo dictated a memorial to President Fillmore. He again expressed his understandings that treaty annuities were to be paid at LaPointe and that the Indians were to be permitted to remain on their lands for "one hundred years to come." The Chief beseeched the President and his agents to honor the Treaty of 1842 as the Indians understood it. President Fillmore told the delegation that he would countermand the Removal Order of 1850 and that annuity payments would

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henceforth be made at LaPointe. He gave Chief Buffalo a written instrument explaining these promises. The delegation returned home. There is apparently no current record of the President's explicit contravention of the removal order.

There is some inconsistency in reports as to what transpired thereafter. Armstrong reported that the annuities for 1852 were paid at LaPointe, that the President's letter was explained to Chief Buffalo and that the Chief also stated that there was yet one more treaty to be made with the President, "and that he hoped in making it they would be more careful and wise than they had heretofore been and reserve a part of their land for themselves and their children." Armstrong, *supra*, at 32.

In his October, 1852 report, however, Superintendent Ramsey reported that the Chippewas had been told there would be no further payment of annuities upon ceded land. Ramsey stated that limiting annuities to those Indians who had removed was the best way to further the removal goal.

Armstrong's report that the 1853 and 1854 annuity payments were made at LaPointe was corroborated by a report of Indian Agent Henry Gilbert. Gilbert reported that the Indians would "sooner submit to extermination than comply with [the Removal Order]." Further, he reported that the whites and Indians were living harmoniously.

In the annual report of the Office of Indian Affairs dated November 24, 1854, the Commissioner noted that some bands of Lake Superior Chippewa were still living on the lands ceded by the treaties of 1837 and 1842. He stated: "It has not, thus far, been found necessary or practicable to remove them." He observed that:

[I]t may be necessary to permit them all [the Chippewas] to remain, in order to acquire a cession of the large tract of country they still own east of the Mississippi, which, on account of its great mineral resources, it is an object of material importance to obtain. They would require but small reservations; and thus permanently settled, the efforts made for their improvement will be rendered more effectual.

The reservation idea was apparently acceptable to the white settlers of Wisconsin. In February, 1854, of that year the Wisconsin Legislature sent a memorial to the President and Congress. This memorial noted that the "Chippewa Indians in the region of Lake Superior are a peaceable, quiet, and inoffensive people, rapidly improving in the arts and sciences; that they acquire their living by hunting, fishing, manufacturing maple sugar, and agricultural pursuits." The memorial requested the President to rescind the prior Removal Order and to guarantee the payment of annuities to the Indians at LaPointe. The memorial also requested laws to "encourage the permanent settlement of those Indians as shall adopt the habits of the citizens of the United States."

In a letter dated August 11, 1854, the Indian Affairs Commissioner directed agent Gilbert to attempt to reach a treaty with the Chippewas, extinguishing their title to lands in Minnesota and Wisconsin. Gilbert was authorized to reserve 748,000 acres for permanent homes of the Indians in areas which did not include mineral lands and which were out of the path of white settlement.

The Indians requested Armstrong to be the interpreter, expressing their conclusion that interpreters at other treaty negotiations had made mistakes. Armstrong recorded Chief Buffalo as saying, in part:

We do not want to be deceived any more as we have in the past. We now understand that we are selling our lands as well as the timber and that the whole, with the exception of what we shall reserve, goes to the great father forever.

Armstrong, *supra*, at 38.

The treaty of LaPointe was concluded September 30, 1854. It provided that the Lake Superior Chippewas living in Minnesota ceded their territory to the United States. These Minnesota bands were granted usufructuary rights on the ceded land pursuant to Article 11. Article 2 speci-

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fied that the United States agreed to withhold from sale, for the use of the Chippewas, certain described tracts of land. One was set aside for the LCO band. The treaty provided that the boundaries would thereafter be fixed under the direction of the President. Other Articles of the treaty provided for annuity payments, provisions for half-breeds and traders, the provision of various hunting devices and ammunition to the Indians, a ban on spirituous liquors, and a promise that the Indians would not be removed from the homes permanently set apart for

them.

Even after the reservation boundaries were settled, many Chippewa Indians continued to roam throughout the ceded area, engaging in their traditional pursuits.

II. STANDARD OF REVIEW ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

[1] A preliminary issue raised by the parties involves the proper scope of review by this court when a case has been decided on cross-motions for summary judgment. The defendants urge essentially that the lower court proceeding be viewed as a bench trial involving documentary evidence. They assert that the district judge was empowered to decide questions turning on factual inferences, that at least "some deference" must be accorded the findings of the trial judge, and that no appellate presumptions against the judgment should apply.

The tribe, by contrast, asserts that on review all inferences of fact must be viewed in the light most favorable to the appellant and that summary judgment is inappropriate if the judgment requires the resolution of competing factual inferences.

There is authority for the general proposition urged by the defendants. In *Tripp v. May*, 189 F.2d 198 (7th Cir. 1951), this court held that "[i]n a nonjury case if both parties move for summary judgment and the court finds that there are issues of fact but that the facts have been fully developed at the hearing on the motions, the court may proceed to decide the factual issues and give judgment on the merits. This of course amounts to a trial of the case and is not technically a disposition by a summary judgment." *Id.* at 200 (quoting 3 Barron & Holtzoff § 1239); accord, *Nielsen v. Western Electric Co.*, 603 F.2d 741, 743, (8th Cir.1979); *Starsky v. Williams*, 512 F.2d 109, 113 (9th Cir.1975); 10 C. Wright & A. Miller, *Federal*

Practice and Procedure § 2720, at 466(1973). When the hearing on cross-motions is in fact a trial, the factual findings of the district court will be overturned only if they are clearly erroneous, *e.g.*, *Starsky*, 512 F.2d at 111.

It is important to remember, however, that cross-motions for summary judgment do not automatically empower the court to dispense with the determination whether questions of material fact exist. *Starsky*, 512 F.2d at 112, *accord*, *Manetas v. International Petroleum Carriers, Inc.*, 541 F.2d 408, 413 (3d Cir.1976); *Hartford Accident & Indemnity Co. v. Northwest National Bank of Chicago*, 228 F.2d 391, 395 (7th Cir.1955). The parties in both *Nielsen*, 603 F.2d at 743, and *Tripp*, 189 F.2d at 200, had *expressly* stipulated to an agreed set of facts and in *Starsky*, the parties had ample notice that the trial judge believed they had "in effect" so stipulated, 512 F.2d at 113.

In the instant case, the record suggests that the tribe did not stipulate to a trial based on the documents before the court. The district judge was well aware that a Rule 56 disposition was precluded if genuine issues of material fact existed and the tribe indicated that if summary judgment were not granted they would call expert witnesses at trial. We are reluctant, therefore, to apply the reasoning in *Tripp* and *Starsky* to the instant case.

We therefore apply the traditional standard that summary judgment will not lie unless, construing all inferences in favor of the party against whom the motion is made, no genuine issue of material fact exists. *Pharo v. Smith*, 621 F.2d 656, 664 (5th Cir.1980), *remanded on reh'g on other grounds*, 625 F.2d 1226 (5th Cir.1980). As recognized by the *Pharo* court, however, only inferences that follow *reasonably* from the evidence need be considered. *Id.*

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Relatively few aspects of this case turn on what could be characterized as factual questions. Relevant issues which might be so classified are: (1) the Indians' understanding of the qualifying language in the Treaties of 1837 and 1842, and (2) whether the Indians "misbehaved" prior to 1850. Rather than considering the appropriateness of summary judgment on these specific questions at this point in our discussion, we consider each issue, *infra*, applying the standard enunciated above.

III. CANONS OF CONSTRUCTION PERTINENT TO INDIAN LAW

[2] First, the Supreme Court has held that Indian treaties must be construed as the Indians understood them.⁵ In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 528, 8 L.Ed. 483 (1832) (McLean, J., concurring), the Court stated:

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.... How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

⁵Although *Montana v. United States*, 450 U.S. 544, 101 S.Ct. 1245, 67 L.Ed.2d 493 (1981), deviated from this rule of construction, *Montana* was controlled by the long established presumption against conveyance of title to the bed of a navigable water. *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926). The concerns critical to the *Montana* Court, state sovereignty and title to a navigable water bed, are not presented in the *LCO* case.

In *Jones v. Meehan*, 175 U.S. 1, 11, 20 S.Ct. 1, 5, 44 L.Ed. 49 (1899), the Court stated that a "treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." The Supreme Court has applied this canon of construction because the Indians and the Government were not bargaining from positions of equal strength, *Choctaw Nation v. United States*, 119 U.S. 1, 28, 7 S.Ct. 75, 90, 30 L.Ed. 306 (1886); the treaties were drawn up by representatives of the United States in a written language unfamiliar to the Indians *Jones v. Meehan*, 175 U.S. 1, 10-11, 20 S.Ct. 1, 4-5, 44 L.Ed. 49 (1899); the Indians' comprehension of treaty terms depended on interpreters employed by the Government, *id.*; and, finally, because the Indians were unfamiliar with the legal manner of expression, *id.* For all these reasons, Indian treaties must be construed as the Indians understood them. *E.g.*, *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31, 90 S.Ct. 1328, 1334-34, 25 L.Ed.2d 615 (1970); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 677-78, 87 L.Ed. 492 (1943); *Tulee v. Washington*, 315 U.S. 681, 684-85, 62 S.Ct. 862, 864-65, 86 L.Ed. 1115 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 116, 58 S.Ct. 794, 797, 82 L.Ed. 1213 (1938).

A second — and related — rule of construction is that ambiguous words and phrases in Indian treaties have been resolved in favor of the Indians. *Arizona v. California*, 373 U.S. 546, 599-601, 83 S.Ct. 1468, 1497-98, 10 L.Ed.2d 542 (1963); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89, 39 S.Ct. 40, 42, 63 L.Ed. 133 (1918); *Winters v. United States*, 207 U.S. 564, 576-77, 28 S.Ct. 207, 211-12, 52 L.Ed. 340 (1908). This rule is particularly applicable if the language of a treaty supports two inferences, one favoring the Indians and one the Government. *Winters*, 207 U.S. at 575-77, 28 S.Ct. at 211-12. As stated by the *Winters* Court:

On account of their relations to the Government, it cannot be supposed that the Indians were alert to exclude by formal words every inference which might mitigate against or defeat the declared purpose of themselves and the Government even if it could be supposed that they had the intelligence to foresee the "double sense" which might some time be urged against them.

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[3] Taken together, these canons mandate that we adopt a liberal interpretation in favor of the Indians. We may consider the history of the treaty, the negotiations, and the parties' practical construction. *E.g.*, *Choctaw Nation v. United States*, 318 U.S. 423, 431-32, 63 S.Ct. 672, 677-78, 87 L.Ed. 492 (1943). Moreover, these same principles must be applied in construing an act of Congress that purports to extinguish treaty rights of the Indians. *E.g.*, *United States v. Michigan*, 471 F.Supp. 192 (W.D. Wis.1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 971, 71 L.Ed.2d 110 (1981). Bearing these principles in mind, we turn to the major issues relevant to this appeal.

IV. NATURE OF THIS TRIBE'S USUFRUCTUARY RIGHTS

The first principal issue relevant to the *LCO* appeal concerns the legal effect of the usufructuary rights enjoyed by the tribe pursuant to the Treaties of 1837 and 1842. Those rights derive in part from Article 5 of the Treaty of 1837 which states:

The privilege of hunting, fishing and gathering the wild rice upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed [sic] to the Indians during the pleasure of the President of the United States.

Article II of the Treaty of 1842 similarly states:

The Indians stipulate for the right of hunting on ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States.⁶

The Supreme Court precedent relating to Indians' rights has drawn a distinction between "aboriginal title" and "treaty-reserved title." *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 277-78, 285, 75 S.Ct. 313, 316-17, 320, 99 L.Ed. 314 (1955); accord, *United States v. Sioux Nation*, 448 U.S. 371, 415 n. 29, 100 S.Ct. 2716, 2740 n. 29, 65 L.Ed.2d 844 (1980). By analogy, aboriginal rights of use enjoy a different legal status than a treaty-recognized rights of use. Compare *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 358, 62 S.Ct. 248, 257, 86 L.Ed. 260 (1941), with *Menominee Tribe v. United States*, 391 U.S. 404, 413, 88 S.Ct. 1705, 1711, 20 L.Ed.2d 697 (1968). For purposes of this appeal, the difference is significant in determining how explicit a subsequent Congressional enactment must be in order to abrogate the Indians' usufructuary rights.

The defendants in *LCO* have conceded that the tribe possessed treaty-recognized rights of use to the land ceded pursuant to the Treaties of 1837 and 1842. They suggest, however, that the qualifying treaty language pertaining to those rights eradicates any distinction from aboriginal rights for purposes of analysis.

A. *Aboriginal Title Versus Treaty-Recognized Title*

⁶Other courts have recognized that "the other usual privileges of occupancy" include the right to fish and engage in traditional gathering activities. *E.g.*, *United States v. Michigan*, 471 F.Supp. 192 (W.D.Mich.1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 971, 71 L.Ed.2d 110 (1981); *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976). That proposition is not challenged by the defendants in this case.

Although "title" is not at issue on this appeal, an understanding of the legal distinction between aboriginal and treaty-recognized title provides a foundation for the discussion that follows.

[4] Aboriginal title is the right of native people in the new world to occupy and use their native area. The United States' sovereign rights to the land within its borders was subject to the aboriginal title of the various Indian tribes. The United States could, however, extinguish aboriginal title at any time and by any means. The United States did not need to compensate the Indians for the taking of such title. Essentially, aboriginal title was title good against all but the United States. *E.g., Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 288-89, 75 S.Ct. 313, 321-22, 99 L.Ed. 314 (1955).

[5] "Treaty-recognized title" is a term that refers to Congressional recognition of

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a tribe's right permanently to occupy land. It constitutes a legal interest in the land and, therefore, could be extinguished only upon the payment of compensation. *E.g., United States v. Sioux Nation*, 448 U.S. 371, 415 n. 29, 100 S.Ct. 2716, 2740 n. 29, 65 L.Ed.2d 844 (1980). The Supreme Court has made clear that abrogation of treaty-recognized title requires an explicit statement by Congress or, at least, it must be clear from the circumstances and legislative history surrounding a Congressional act. *Mattz v. Arnett*, 412 U.S. 481, 505, 93 S.Ct. 2245, 2258, 37 L.Ed.2d 92 (1973).

B. Aboriginal and Treaty-Recognized Rights of Use

1. No Dependence on Right of Permanent Occupancy.

[6] Both aboriginal and treaty-recognized title carry with them a right to *use* the land for the Indians' traditional subsistence activities of hunting, fishing, and gathering. Treaty-recognized rights of use, or usufructuary rights, do not necessarily require that the tribe have title to the land. For instance, in the seminal case of *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), the Yakima Indians had ceded, pursuant to the Treaty of 1859, to the United States all of their lands in Washington State except for a specifically reserved tract. The same treaty reserved to the Indians the "right of taking fish at all usual and accustomed places, in common with citizens of the Territory." *Id.* at 378, 25 S.Ct. at 663. One of the accustomed fishing sites of the Indians was the Columbia River. The land along the shores of the river was not included in the Indians' reservation. This land subsequently passed, pursuant to contracts and patents with the State of Washington, to the *Winans* defendants. The defendants were generally unwilling to let the Indians cross their lands to reach the river.⁷

The *Winans* Court characterized the Treaty of 1859 as "not a grant of rights to the Indians, but a grant of rights from them — a reservation of those not granted." *Id.* at 381, 25 S.Ct. at 664. Relying on this framework of analysis, the Court held that the "Indians were given a right in the land — the right of crossing it to the river — the right to occupy it to the extent and for the purpose mentioned." *Id.*

Winans illustrates a treaty-recognized right that was not dependent on either the Indians' title or right to occupy permanently the land in which it was to be exercised.

⁷The defendants also obstructed the Indians' fishing, assuming the Indians had been able to reach the river, by the use of "fishing-wheels." The *Winans* Court held that such obstruction was impermissible. 198 U.S. at 384, 25 S.Ct. at 665.

The scope of treaty-recognized non-reservation fishing rights was quite recently at issue before the Supreme Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). The *Fishing Vessel Association* case refers at length to the previous disposition in *Winans*, thus reaffirming that treaty-recognized rights of use depend neither on title nor right of permanent occupancy; rather, they are similar to a *profit a prendre*. See *Kennedy v. Becker*, 241 U.S. 556, 562, 36 S.Ct. 705, 707, 60 L.Ed. 1166 (1916); *United States v. Winans*, 198 U.S. 371, 381, 25 S.Ct. 662, 664, 49 L.Ed. 1089 (1905).

2. Degree of Explicitness Required to Abrogate Rights.

The primary relevance of the distinction between aboriginal rights of use and treaty-recognized usufructuary rights to the instant case lies in the degree of explicitness required to abrogate such rights. Reflecting the case with which Congress may extinguish aboriginal title, the Supreme Court required only an implicit abrogation of off-reservation usufructuary rights in *United States v. Santa Fe Pacific Railroad*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941). In *Santa Fe*, the Walapai Indians held aboriginal title, as well as the related aboriginal rights of use, to their tribal lands. The Government had made several unsuccessful efforts to remove the Walapais and there had been repeated suggestions for settling

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the tribe on a reservation. "[V]iolent problems," *id.* at 358, 62 S.Ct. at 257, existed between the Walapais and an increasing contingent of white settlers. In 1881, the Indians requested that they be settled on a reservation

because white men were overrunning their other lands. In 1883, the Walapais' reservation was created. The Act by which the reservation was established made no explicit mention of whether the tribe retained any rights in the non-reservation lands.

The Supreme Court found that the off-reservation tribal rights were implicitly extinguished, stating:

They were in substance acquiescing in the penetration of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seemed to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others.

Id. at 358, 62 S.Ct. at 257 (citations omitted).

By contrast, the abrogation of treaty-recognized rights, like the extinguishment of treaty-recognized title, appears to require something more explicit. The parties disagree as to precisely what is required. Both parties, however, recognize the importance of *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), to this inquiry.

The Menominee Tribe had been granted a reservation in Wisconsin pursuant to the Treaty of Wolf River (1854), 10 Stat. 1064. As interpreted, this treaty included the traditional hunting and fishing rights on reservation land. 391 U.S. at 406, 88 S.Ct. at 1707. In 1954, Congress

passed an act which, as amended, granted designated states, including Wisconsin, jurisdiction over offenses committed in specified areas of Indian country. Pub.L. No.280, 67 Stat. 588 (1954) (codified as amended at 18 U.S.C. § 1162). That Act explicitly provided, however, that "Nothing in this section ... shall deprive any Indian or any Indian tribe, band, or community of any right, privilege or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof." 391 U.S. at 410-11, 88 S.Ct. at 1709-10 (quoting Pub.L. No.280, 67 Stat. 588 (1954) (codified as amended at 18 U.S.C. § 1162)). That same year, Congress passed the Menominee Indian Termination Act of 1954, 68 Stat. 250 (codified as amended at 25 U.S.C. §§ 891-902). The Termination Act provided for the withdrawal of federal supervision over the members and property of the tribe. The reservation became a Wisconsin county and a Wisconsin corporation was formed to hold the property of the tribe. The Act provided that, after the termination of federal supervision, the laws of the State would apply to the tribe and its members. 391 U.S. at 410, 88 S.Ct. at 1709. The Termination Act became fully effective in 1961. In 1962, Wisconsin declared that the Menominees were subject to state hunting and fishing regulations. The state prosecuted three Indians for violating those regulations. The Wisconsin Supreme Court upheld the convictions, holding that the hunting and fishing rights of the Menominees had been revoked by the Termination Act.

The Menominees subsequently brought suit against the United States, claiming an entitlement to compensation for the extinguishment of their rights. The Supreme Court, upholding the Court of Claims, held that the Termination Act had not cancelled the Menominees' rights and that they could bring an injunctive suit against Wisconsin's disturbing their hunting and fishing rights. The Court concluded:

We find it difficult to believe that Congress,
without explicit statement, would

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subject the United States to a claim for compensation by destroying property rights conferred by treaty, particularly when Congress was purporting by the Termination Act to settle the Government's financial obligations toward the Indians.

391 U.S. at 413, 88 S.Ct. at 1711 (footnotes omitted) (emphasis added).

The defendants contend that *Menominee* permits an implicit abrogation of treaty-recognized rights so long as there is "supporting evidence that the parties to the later legislation intended and understood that the extinguishment of rights would result." The tribe, by contrast, asserts that only an explicit Congressional statement permits cancellation of rights consistent with *Menominee*. We have stated the facts of *Menominee* at some length because we find merit in the defendants' assertion that the factual situation in that case is quite different from the instant case.⁸

Mattz v. Arnett, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973), a more recent Supreme Court case, is helpful in determining the scope of *Menominee*. In *Mattz*, the issue was whether the Act of June 17, 1982 should be read as an implicit termination of an Indian reservation that had been created by an earlier executive order. The

⁸We do not agree with the defendants' suggestion, however, that the fact *Menominee* involved rights pursuant to a treaty granting a reservation makes that case inapposite to the present appeal. The rights of use in that case were indeed originally tied to treaty-recognized title. Nonetheless, the usufructuary rights have independent significance.

Court held that the reservation was not terminated, stating: "A congressional determination to terminate must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." *Id.* at 505, 93 S.Ct. at 2258 (citations omitted).

[7] Although *Mattz* dealt with cancellation of treaty-recognized title rather than treaty-recognized usufructuary rights, we believe the distinction is irrelevant to the determination as to how explicit a subsequent Congressional Act must be in order to extinguish Indians' treaty-recognized rights. An abrogation of treaty-recognized rights subjects the United States to a claim for compensation, *Menominee*, 391 U.S. at 404, 88 S.Ct. at 1705, 20 L.Ed.2d at 697, just as a rescission of treaty-recognized title does, *United States v. Sioux Nation*, 448 U.S. 371, 415 n. 29, 100 S.Ct. 2716, 2740 n. 29, 65 L.Ed.2d 844 (1980). The *Menominee* Court found no explicit statement regarding cancellation of the tribe's hunting and fishing rights; further, it found such a termination inconsistent with the purpose of the Termination Act, 391 U.S. at 413, 88 S.Ct. at 1711, and with the Congressional intent evidenced by reading the Termination Act *in pari materia* with Public Law 280, *id.* at 410-11, 88 S.Ct. at 1709-10. We believe that the proper reading on *Menominee* is consistent with *Mattz*: a termination of treaty-recognized rights by subsequent legislation must be by *explicit* statement or must be *clear* from the surrounding circumstances or legislative history.

C. *Rights of the LCO Tribe Pursuant to the Treaties of 1837 and 1842*

1. Implied Reservation.

Initially, we note that the tribe contends the Chippewas held treaty-recognized title to their lands pursuant to the Treaty of August 19, 1825, 7 Stat. 272 (Treaty of Prairie du Chien). They reason that this recognized title

included the right to use the land for traditional pursuits and, that absent specific language in the Treaties of 1837 and 1842 extinguishing such rights, they were impliedly reserved to the Indians.

The state defendants assert that the Treaty of Prairie du Chien was not before the district court and should this court deem it relevant, a remand is essential. We do not believe a remand is mandated on that issue.

We need not rely on an implicit reservation of rights because the usufructuary rights of the LCO tribe were explicitly addressed in the Treaties of 1837 and 1842. *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905), on which the

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appellants correctly rely as involving treaty-recognized usufructuary rights, does not appear to depend on any treaty prior to that in which the cession of land and simultaneous reservation of usufructuary rights were made. Although the tribe may indeed be correct in stating both that the Treaty of Prairie du Chien conferred recognized title on the tribe, *e.g.*, *Minnesota Chippewa Tribe v. United States*, 19 Indian Cl. Comm'n 514, 524 (1968) (1837 treaty); *Minnesota Chippewa Tribe v. United States*, 19 Indian Cl. Comm'n 319, 330 (1968) (1842 treaty), and that usufructuary rights were implicitly reserved in later treaties, this line of analysis is not essential to our disposition of this case.

2. Explicit Reservation.

[8] Even though the parties agree that there was an explicit reservation of usufructuary rights in the two treaties, they disagree as to the impact of the qualifying language in the treaties: the statement in the Treaty of 1837 that the enumerated rights are guaranteed "during the pleasure of the President of the United States" and

the language in the 1842 treaty indicating that the stipulated rights would endure until the Indians were "required to remove by the President of the United States." The limiting language raised two questions. The first is whether these *non-permanent* usufructuary rights recognized by treaty can be abrogated by a less explicit showing of intent than *permanent* treaty-recognized rights. The second is the meaning of the qualifying language in the two relevant treaties. We discuss each in turn.

The defendants strenuously urge that because the LCO's treaty-reserved usufructuary rights were "temporary," they could be extinguished by implication. The defendants support the district judge's characterization of the recognized rights as analogous to "permissive occupation" and rely on language in *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 911 (Ct.Cl. 1963), and *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 278-79, 75 S.Ct. 313, 316-17, 99 L.Ed. 314 (1955). Essentially the defendants are arguing that non-permanent treaty-recognized rights are like aboriginal rights.

The term "permissive occupation" is more misleading than helpful in analyzing the case at bar. In *Tee-Hit-Ton Indians*, 348 U.S. at 278-79, 75 S.Ct. at 316-17 (1955), the Supreme Court employed the term in concluding that the rights of the Indian plaintiffs to Alaskan land were not legal rights and therefore no compensation was due for the taking of timber from those lands. The Court rejected the argument that treaty-recognized title had been conferred on the Indians by either of two Congressional acts, noting that the intention of those acts had been to "retain the *status quo* until further congressional or judicial action was taken." *Id.* at 278, 75 S.Ct. at 317 (footnote omitted). The "*status quo*" was the Indians' aboriginal title.

In *Minnesota Chippewa Tribe v. United States*, 315

F.2d 906, 911 (Ct.Cl.1963), the court's reference to "permissive occupation" was a direct quote from *Tee-Hit-Ton Indians*, and was relevant to the court's conclusion that the Indians indeed had recognized title to disputed land. As used in both *Tee-Hit-Ton Indians and Minnesota Chippewa Tribe*, "permissive occupation" is synonymous to aboriginal title.

The judge below first used the term "permissive occupation" in the *Ben Ruby* case, 464 F.Supp. at 1348, which was a quiet title action decided in the same opinion with the *LCO* case. He relied on *Mole Lake Band v. United States*, 139 F.Supp. 938 (Ct.Cl.1956), *cert. denied*, 352 U.S. 892, 77 S.Ct. 130, 1 L.Ed.2d 86. In *Mole Lake*, the Court of Claims had found that the intention of the parties to the cession Treaties of 1837 and 1842 was to pass title in the land to the United States and that the Indians were to have "only a revocable license to use the land until the President required them to vacate it." 139 F.Supp. at 940⁹

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We concur with the general proposition that if the Indians' right of occupancy is temporary, their interest in the land is more similar to a "revocable license" than it is to "title." Even so, we do not think it necessarily follows that an expressly granted revocable license to use land confers no greater rights than "aboriginal title" which carries no legal right at all against the United States, *Tee-Hit-Ton Indians*, 348 U.S. at 279, 75 S.Ct. at 317. Even in the context of the *Ben Ruby* case, therefore, the term "permissive occupation" would appear less than an exact statement of the rights enjoyed by the Indians.

The term "permissive occupation" is especially in-

⁹As we discuss in more detail in Section V(B), *infra*, this finding is mere dicta in light of the actual disposition in the *Mole Lake* case. The *Mole Lake* court did not use the term "permissive occupation."

applicable, however, to the *LCO* case which involves the reservation of usufructuary rights rather than a claim of title. *Tee-Hit-Ton Indians, Ben Ruby, Minnesota Chippewa Tribe, and Mole Lake* all concerned questions of title. It is perfectly consistent with the basic tenets of property law that one may enjoy a *right of use* that is limited in duration. The fact that it is so limited makes it no less of a legal right.

We are not persuaded, therefore, that the rights of the *LCO* band pursuant to the Treaties of 1837 and 1842 were other than treaty-recognized rights of use which are of legal significance. Despite his use of the term "permissive occupation," the district judge apparently reached the same conclusion on this point. The fact that the rights enjoyed by the *LCO* band were legally enforceable against the United States compels that conclusion that they should not be extinguished by mere implication.

The second dispute between the parties concerns the meaning of the limiting language. "During the pleasure of the President" and "until required to remove by the President" would appear to confer unbridled discretion on the Government to extinguish the usufructuary rights. As the district court recognized, however, Indian treaties must ordinarily be construed as they were understood by the Indians. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 582, 8 L.Ed. 483 (1832) (McLean, J., concurring); *accord*, e.g., *Choctaw Nation v. Oklahoma*, 397 U.W. 620, 630-31, 90 S.Ct. 1328, 1334-35, 25 L.Ed.2d 615 (1970); *see* Section III, *supra*.

The judge below found that the Chippewas understood the treaties to mean that they enjoyed the use of their lands for an unlimited time *unless they misbehaved by harassing white settlers*. In reaching this conclusion, the district judge relied on the Indians' statements during the negotiations preceding the Treaty of 1837 indicating that they wished to continue hunting and fishing on the ceded lands and that they envisioned their

grandchildren negotiating for further annuities in sixty-years time. He also noted that both Indians and non-Indians present at the 1842 treaty negotiations later wrote that the Indians had been assured they would not have to remove unless they misbehaved.

The defendants challenge Judge Doyle's conclusion as going beyond his "discretion" and argue that both treaties were made pursuant to the removal policy which contemplated placing the Indians on lands farther west. They also argue that Judge Doyle should not have relied on the writings of persons present at the negotiations because this is evidence of "low quality."

The difficulty with the defendants' argument is that it does not really address what the *Indians* believed the treaty to mean. The fact that the treaties were conceived pursuant to a policy of "removal" is not inconsistent with either the assertion that the treaties were unacceptable to the Indians unless modified by an oral understanding that allowed them to stay on the land so long as they did not harass white settlers or the Government's recognition that this concession was therefore essential. Further, whether those persons who wrote of their recollections provided only "low quality" evidence for a trial over a hundred years later is somewhat irrelevant given that it is the *only* evidence of the *Indians' understanding* of the treaty.

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One further point must be made although it is not explicitly argued by the defendants. A finding as to the "intent" of the Indians is arguably a factual finding that is inappropriate to a disposition by summary judgment. Because this aspect of the case was decided adversely to the defendants, we construe all inferences in favor of the defendants in determining whether a genuine issue of material fact exists. *Pharo v. Smith*, 621 F.2d 656, 664

(5th Cir.1980), *remanded on reh'g on other grounds*, 625 F.2d 1226 (5th Cir.). Because the defendant's evidence on this point does not address what the Indians believed the treaty to mean but, rather, the motive of the Government in seeking the treaty, we conclude that no genuine issue of fact existed.

We concur therefore in the district judge's conclusion that the qualifying language in the two treaties did not confer the unlimited discretion of the Executive that it appears to; rather, it required that the Indians be denied their usufructuary privileges only if the Indians were instrumental in causing disturbances with white settlers.

d. Analogous Precedent

Two cases that involve a reservation of usufructuary rights by qualified treaty language support our conclusion that an abrogation of such rights should not be found without compelling evidence that such an extinguishment was intended. In both *United States v. Michigan*, 471 F.Supp. 192 (W.D.Mich.1979), *aff'd in relevant part*, 653 F.2d 277 (6th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 971, 71 L.Ed.2d 110 (1981), and *People v. LeBlanc*, 399 Mich. 31, 248 N.W.2d 199 (1976), Chippewa bands claimed the right to fish, free from State regulation, in portions of the Great Lakes. Pursuant to the Treaty of 1836, 7 Stat. 495, the tribes had ceded land to the United States. The treaty stated that: "The Indians stipulate for the right of hunting on the lands ceded, with the other usual privileges of occupancy, *until the land is required for settlement.*"

After concluding that the above-quoted language of Article XIII embraced the right to fish, *United States v. Michigan*, 471 F.Supp. at 259, *People v. LeBlanc*, 248 N.W.2d at 206, both courts addressed the question whether the rights had been extinguished by subsequent settlement of the land. The *LeBlanc* court found that the qualifying language was included in the treaty in order to

allow white settlement of the land. Because the Great Lakes themselves weren't required for settlement the fishing rights were not terminated. 248 N.W.2d at 207. The *Michigan* court noted that the language of limitation was "ambiguous as to any definite period of Indian occupancy," 471 F.Supp. at 259, and relying on *LeBlanc*, concluded that the fishing rights were not terminated by operation of the language, *id.*

Both the *Michigan* and *LeBlanc* courts also rejected claims that the Treaty of 1855 had abrogated the treaty-recognized fishing rights. *United States v. Michigan*, 471 F.Supp. at 262-65; *People v. LeBlanc*, 248 N.W.2d at 210-12. In so concluding, both courts relied on the language in *Menominee* that is discussed *supra*. 471 F.Supp. at 262; 248 N.W.2d at 212.

The treaties relevant to the *Michigan* and *LeBlanc* cases are not identical to those before this court. We do not suggest that either *Michigan* or *LeBlanc* is dispositive of the instant controversy. It is important, however, that both the Michigan district court and the Supreme Court of that state found that "conditional" usufructuary rights could be abrogated only by an extremely strong showing that such was the intent of Congress. It is also significant that the courts were careful not to construe the language of limitation so as to prejudice the Indians.¹⁰

¹⁰The defendants attempt to minimize the relevance of the *Michigan* case by stating that the Sixth Circuit rejected the rationale of the district court and followed instead the reasoning of the *LeBlanc* court. This argument is at best irrelevant and at worst tends to be misleading.

The district court in *Michigan* concluded that the State had *no* power to regulate Indian fishing because of the recognized treaty rights. 471 F.Supp. at 274. By contrast, the *LeBlanc* court found that certain State regulations would be permissible and carefully outlined the scope of such regulation. 248 N.W.2d at 212-15.

The Sixth Circuit twice considered the *Michigan* case. The first time, the case was remanded for a determination whether federal regulations regarding gill-net fishing preempted the field. In the context of reaching that disposition, the Sixth Circuit stated:

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E. Summary

A treaty is essentially a contract between two sovereign powers. *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, 675, 99 S.Ct. 3055, 3069, 61 L.Ed.2d 823 (1979). It is not surprising, therefore, that the rule we find emerging from prior cases dealing with Indian rights is a rather straightforward statement of contract law. If the Government explicitly promised the Indians a property interest in land, the Government would be subject to a claim for compensation if it breached the terms of the agreement. If the United States promised a tribe that it would enjoy certain rights either for a specified period or until a specified event or events occurred, those rights were legally enforceable by the Indians. When the period

Although this Court has not finally decided the issue, it is inclined to the view ... [that] in the absence of federal regulations occupying the field, the Supreme Court of Michigan in *People v. LeBlanc*, *supra*, has correctly stated that applicable standard governing state regulation of gill-net fishing.

United States v. Michigan, 623 F.2d 448, 450 (6th Cir.1980) (*per curiam*). It is clear that the aspect of the district court's disposition that was not wholly endorsed by the Sixth Circuit was the *permissible scope of state regulation*.

Because of Judge Doyle's conclusion that the LCO's treaty rights were extinguished in 1854, the permissible scope of regulation in the face of treaty-recognized rights was not decided below. It is not before this court on appeal. We fail to see what relevance the Sixth Circuit's favorable reference to the *LeBlanc* decision has to the instant controversy.

Concerning the issues in *Michigan* and *LeBlanc* that are relevant to this case, the Michigan district court and the state court reached the same conclusion: that treaty-recognized usufructuary rights are not to be found abrogated by implication and that the rights at issue in those cases were still viable. In its latest consideration of *Michigan*, the Sixth Circuit affirmed this view, stating: "The treaty-guaranteed

expired or the contemplated event or series of events occurred, the rights could be extinguished by the Government without liability.

If the *LCO* case involved a property interest that by its very nature contemplated permanence, such as title, the argument of the defendants would be more persuasive. What was given the Indians pursuant to the Treaties of 1837 and 1842, however, was a right of use for a period, the duration of which was determined by the Indians' behavior.

[9] If harassment of white settlers occurred, the Executive could extinguish the Indians' rights without the Government's incurring liability. If the Chippewas' rights were abrogated for any other reason, however, the Government would potentially be subject to a claim for compensation. An act of Congress should therefore be construed as extinguishing usufructuary rights only if the legislation expressly stated that such was the intent of Congress or if the legislative history and surrounding circumstances made clear that abrogation of treaty-recognized rights was intended by Congress.

V. REMOVAL ORDER OF 1850

A. *Standing of Defendants to Cross-Appeal*

The judge below held that neither the Removal Order of 1850 nor the Government's attempts forcefully to remove the Indians terminated the Chippewas' usufructuary rights. 464 F.Supp. at 1358-59. His reasoning, which was developed in the *Ben Ruby* portion of the combined opinion, *id.* at 1348-50, was as follows: (1) the

fishing rights preserved to the Indians in the 1836 Treaty, including the aboriginal rights to engage in gill-net fishing, continue to the present day as federally created and federally protected rights." *United States v. Michigan*, 653 F.2d 277, 279 (6th Cir.), *cert. denied*, 454 U.S. 1124, 102 S.Ct. 971, 71 L.Ed.2d 110 (1981).

Treaties of 1837 and 1842 permitted removal only if the Indians harassed white settlers; (2) the rec-

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ord failed to disclose the kind of serious misbehavior that would have justified removal under the terms of the two treaties; (3) the Removal Order of 1850 was not authorized by the two earlier treaties and was therefore without legal effect because it was beyond the scope of the President's powers. *Id.* at 1350.

[10] The defendants have cross-appealed in both *Ben Ruby* and *LCO* from the district court's finding of invalidity. The tribe has moved to dismiss the defendants' cross-appeal on the ground that the defendants are not "aggrieved parties" and therefore lack standing to appeal. There is no doubt that the defendants are entitled to urge before this court as an alternative basis for upholding the summary judgment granted below that the 1850 Removal Order was valid and extinguished the Chippewas' usufructuary rights. It is well established that a grant of summary judgment may stand if a reviewing court finds any sufficient basis for the judgment in the record. *Helvering v. Gowran*, 302 U.S. 238, 245-46, 58 S.Ct. 154, 157-58, 82 L.Ed. 224 (1937); *Miller v. Gateway Transportation Co.*, 616 F.2d 272, 275 n. 7 (7th Cir.1980); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2716, at 440 (1973).

Because we conclude that the Treaty of 1854 does not support the disposition reached by the district judge, see Section VI, *infra*, the defendants' argument pertaining to the 1850 Removal Order must be considered by this court. As a result, whether those arguments are considered a cross-appeal or merely as an alternative ground for affirmance has no effect on the course of our opinion or the disposition of this case. We therefore will assume, without so deciding, that the defendants are aggrieved

parties who have standing to challenge the findings of the judge below as to the Removal Order.

*B. Preclusive Effect of Mole Lake or
Gunroe Cases*

Each party to this controversy contends that the question whether the 1850 Removal Order was valid has been previously determined and that the doctrines of res judicata or collateral estoppel preclude consideration of the question in this action. We first discuss the defendants' contention that *Mole Lake Band v. United States*, 139 F.Supp. 938 (Ct.Cl.), *cert. denied*, 352 U.S. 892, 77 S.Ct. 130, 1 L.Ed.2d 86 (1956), establishes that the Removal Order was valid and bars litigation of that issue in the present case.

1. Res Judicata: *Mole Lake*.

In *Mole Lake*, three bands of Lake Superior Chippewa Indians, including the LCO, sued the United States. The complaint alleged that in creating their reservations the United States purported to convey to the Indians an area of land that the federal Government had previously conveyed to the State. As a result, the Indians had allegedly been deprived of some of the lands within their reservations as well as the proceeds from the timber cut from these lands. The court notified Wisconsin of its right to intervene. The State did so, asserting its ownership of the swamplands in question and the right to proceeds therefrom. The State also reserved its rights to challenge the jurisdiction of the district court over both the subject matter of the litigation and over the State in its sovereign capacity.

Because of the State's reluctance to submit to the court's jurisdiction, the *Mole Lake* court declined to consider the State's position unless it was critical to the resolution sought between the Indians and the federal Government. The holding of the *Mole Lake* court was

that the United States was obligated by the treaty creating the reservations to secure the enjoyment of the lands and the proceeds therefrom to the Indians. *Id.* at 941. "Whether or not the State of Wisconsin ever has owned or does now own the swamp lands in the reservations is immaterial to the question of the obligation of the United States to the Indians, under the Treaty of 1854." *Id.* Because of this resolution, adjudication of the State's intervenor petition was unnecessary and the petition was accordingly dismissed by the court. *Id.*

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[11, 12] The doctrine of *res judicata* bars a subsequent suit between the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979); accord, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971). Considering the limited role played by the State of Wisconsin in *Mole Lake*, and the court's express dismissal of the State's petition without adjudication, we cannot conclude that the State was a party to *Mole Lake* in the sense envisioned by the *Parklane* Court. Further, the cause of action in *Mole Lake* differs from that in the instant case. Neither the issue framed by the parties in *Mole Lake* nor the court's holding required consideration of the 1850 Removal Order. Although the judge discussed the Removal Order in the context of the historical events which culminated in the grant of the reservations lands in 1854, 139 F.Supp. at 939, he neither expressed nor had reason to consider the *validity* of the Removal Order.¹¹ We conclude therefore

¹¹The doctrine of collateral estoppel similarly does not preclude litigation of the validity of the 1850 Removal Order because the validity of that order was not at issue in *Mole Lake*. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649 n. 5, 58 L.Ed.2d 552 (1979).

that *Mole Lake* is not a bar to consideration of the validity of the 1850 Removal Order in the instant case. We next address the tribe's contention that *State v. Gunroe*, 53 Wis.2d 390, 192 N.W.2d 892 (1972), is determinative of this issue pursuant to the doctrine of collateral estoppel.

2. Collateral Estoppel: *State v. Gunroe*.

[13] We note initially that the defendants moved this court, prior to oral argument, to strike all references in the plaintiff's combined responsive brief to the collateral estoppel argument premised on *Gunroe*. The defendants contend that the issue was not properly raised before the district court. Because this motion was not decided prior to oral argument and subsequent consideration of this case, the panel has considered the collateral estoppel argument. We have found it to be unpersuasive for the reasons indicated below. We conclude that, in light of the fact the argument did receive consideration in due course, the motion to strike should be denied and the collateral estoppel issue should be disposed of on its merits.

"Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979).

In *Gunroe*, the Wisconsin Supreme Court considered the charges that certain enrolled members of two bands of Lake Superior Chippewa Indians had violated Wisconsin law by gill-net fishing and fishing without a license in Lake Superior. The Indians defended on the ground that their right to fish in Lake Superior was guaranteed by the Treaty of 1854 which had established their reservations. The Treaty of 1854 made no explicit reference to whether the right to fish in Lake Superior existed. In finding that the Indians enjoyed the claimed rights, the *Gunroe* court

reasoned that because Lake Superior was a traditional Chippewa fishing ground, the Indians would have assumed when they signed the 1854 Treaty that the "right to fish" granted them was not limited to the waters of their reservations but also included Lake Superior. 192 N.W.2d at 901.

The *Gunroe* court did discuss the State's contention that the 1850 Removal Order abrogated whatever fishing rights the Indians had, as well as the Indians' response that the 1850 Order did not revoke fishing rights because it was never enforced. The court apparently reasoned that the 1850 Order was relevant because if the Indians' fishing rights had then been revoked, the Chippewas' claim that Lake Superior had been their traditional hunting ground since the Sixteenth Century, and therefore was implicitly recognized in the 1854 Treaty,

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would be less forceful. *See id.* at 900. The Wisconsin court concluded that the 1850 Order "did not result in an actual revocation of fishing rights," *id.*, and that it had no effect upon the rights granted by the 1854 Treaty.

We do not believe that *Gunroe* precludes the State from urging the validity of the 1850 Order in the instant case. It is questionable whether any consideration of the Removal Order was "necessary," *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973, 59 L.Ed.2d 210 (1979), to the *Gunroe* holding. To the extent the Order was deemed relevant by that court, it was in the limited context of determining whether issuance of the Order had actually curtailed the Chippewas' use of Lake Superior as a fishing ground. The validity of the Removal Order was not in issue. We therefore conclude that the defendants are not precluded from relying on the 1850 Removal Order in the instant appeals.

In light of this conclusion, we do not address the

other arguments urged by the defendants as to why the doctrine of collateral estoppel is inapplicable to this controversy. In so doing, we imply no view whatsoever as to the merits of those arguments.

C. Validity of 1850 Removal Order

[14] Congress has plenary authority over Indian affairs. *E.g.*, *Warren Trading Post v. Arizona Tax Commission*, 380 U.S. 685, 85 S.Ct. 1242, 14 L.Ed.2d 165 (1965). This power is rooted in the treaty power, U.S. Const. art. II, § 2, cl. 2, and the Indian commerce clause, *id.* at art. I, § 8, cl. 3. *E.g.*, *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S.Ct. 2578, 65 L.Ed.2d 665 (1980).

[15] An executive order cannot exceed the scope of the authority delegated by Congress. *Cole v. Young*, 351 U.S. 536, 76 S.Ct. 861, 100 L.Ed. 1396 (1956); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153 (1952); *Marks v. CIA*, 590 F.2d 997, 1003 (D.C.Cir.1978); *Independent Meat Packers Association v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975), *cert. denied*, 424 U.S. 966, 96 S.Ct. 1461, 47 L.Ed.2d 733 (1976). The President cannot, therefore, purport to implement a treaty by action which in fact exceeds the limits of that treaty. *See Cole v. Young*, 351 U.S. 536, 557, 76 S.Ct. 861, 873, 100 L.Ed. 1396 n. 20 (1956).

[16] As stated in Section IV(C)(2), *supra*, we concur with the district judge's conclusion that the Treaties of 1837 and 1842 authorized termination of the Chippewas' right to exercise their usufructuary privileges on ceded land *only* if the Indians misbehaved by harassing white settlers. The pivotal question relevant to the validity of the 1850 Removal Order is therefore whether the Indians had misbehaved.

This is arguably a question of fact. It was decided, in

favor of the tribe, on a motion for summary judgment. applying the standard set forth in Section II, *supra*, we can uphold the judgment below on this point only if, construing all inferences in favor of the defendants, there exists no genuine issue of material fact.

As early as 1846, the sale of whiskey to the Indians by white settlers was seen as a problem and a reason for removing the Indians. One could infer from this that Indian misbehavior existed; one could not reasonably conclude that the white settlers were blameless for whatever incidents occurred.

Two incidents of Indian violence were reported by the LaPointe subagent in 1847. In one, the Indian was found to have acted in self-defense; in the other, a white was found to be at fault. In the same report that discussed these incidents, the subagent concluded that "every crime of any magnitude which has been committed may be traced to the influence of the white man." In 1848, *no* conflicts between Indians and whites were reported by the Commissioner of Indian Affairs.

The 1849 Report of the Commissioner and the report of the LaPointe subagent for the year 1849 discussed disturbances caused by the Chippewa. Again, the sale of whiskey was blamed and, additionally, the subagent suggested that the Indians were punished in situations where white settlers were not.

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The question before the district court was whether the totality of these incidents created at least an inference that the 1850 Removal Order was a direct response to Indian misbehavior. In light of the fact that the Order of 1850 made no reference whatsoever to Indian disruptions and that the incidents themselves were relatively few in number and at least in part instigated by whites, we

think Judge Doyle correctly concluded that no *genuine* issue of material fact existed as to whether those acts of misbehavior motivated the 1850 Removal Order.

Whatever policy or other reasons might have motivated the Removal Order, we concur in Judge Doyle's conclusion that the 1850 Order exceeded the scope of the 1837 and 1842 treaties and was therefore invalid.

VI. TREATY OF 1854

[17] As a preliminary matter, we note that the tribe contends the Treaty of 1854 was before the district court for only the limited purpose of demonstrating a shift in the Government's policy from removing the Indians to providing them reservations. The defendants, not surprisingly, disagree. Our review of the pleading suggests that this would be a difficult question to resolve, primarily because both parties framed their contentions in the broadest possible language.

At oral argument, the tribe asserted that it believed the appeal could be resolved without remand on the subject of the 1854 treaty and that the Indians were urging a remand only as a secondary position. We believe that a resolution on the merits is possible and observe that it in no way prejudices the tribe.

Judge Doyle found that the Treaty of 1854, by which the Chippewa bands were granted reservations on portions of the land they had ceded to the Government in 1837 and 1842, extinguished the LCO's usufructuary rights on the remainder of the ceded land. As discussed in Section IV, *supra*, the Treaty of 1854 should be held to have abrogated these treaty-recognized rights only if the 1854 enactment expressly refers to termination of the usufructuary rights or if the circumstances and legislative history surrounding the treaty make clear that Congress intended such an abrogation. See *Menominee Tribe v. United States*, 391 U.S. 404, 415, 88 S.Ct. 1705, 1712, 20

L.Ed.2d 697 (1968). Because the Treaty of 1854 made no reference whatsoever to the usufructuary rights of the Chippewas who had previously ceded their territory to the United States, our analysis focuses on whether the circumstances surrounding the treaty compel the conclusion that termination of such rights was intended.

A. *Relationship Between Occupancy and Usufructuary Rights*

A fundamental aspect of Judge Doyle's reasoning regarding the Treaty of 1854 was his conclusion that the Treaties of 1837, 1842, and 1854 all evidence an intent to link occupancy with the exercise of usufructuary rights. Judge Doyle reasoned that because the 1854 treaty provided permanent homes for the LCO band on specified tracts, it withdrew any conditional right to establish such homes on non-reservation lands in the ceded territory.¹² The court concluded that if the right to establish homes on the whole of the territory was lost, the right to hunt and fish thereon was similarly relinquished.

It should be noted that the district judge did not suggest that usufructuary rights are *always* tied to occupancy. Such a conclusion would be clearly inconsistent with precedent such as *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089

¹²This aspect of Judge Doyle's reasoning was critical to the result in *Ben Ruby*, 464 F. Supp. at 1352. The right to "occupy" the ceded lands is not before this court, unless one considers entering onto public lands to exercise usufructuary rights a limited kind of "occupancy." For purposes of these appeals, we will assume the correctness of Judge Doyle's conclusion that the Indians' right to occupy the ceded land was terminated by the Treaty of 1854 and will focus solely on whether that finding compels the conclusion that the LCO's usufructuary rights were similarly extinguished.

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(1905); see Section IV(B)(1), *supra*. His conclusion was simply that the Treaty of 1854, read *in pari materia* with the earlier Treaties of 1837 and 1842, inextricably linked occupancy and usufructuary rights.

In so concluding, Judge Doyle relied on the statement by Chief Buffalo at the treaty negotiations that he now understood the "whole" of these non-reservation lands would go to the United States. The district court stated in *LCO* that this statement "indicates the Indian understanding that they were relinquishing any general claims they might have had to lands outside their reservations." 464 F.Supp. at 1359. The statement made by Chief Buffalo does not compel this conclusion. There is evidence that the Indians misunderstood the Treaties of 1837 and 1842 when those treaties were signed. Rather than recognizing that they were relinquishing title to their territory, the Chippewas then believed that they were merely granting the United States a right to the timber and minerals that were the primary impetus for Governmental interest in the land. Subsequently, the Indians came to understand that they had relinquished title to the territories. In this context, the statement by Chief Buffalo at the time of the 1854 treaty negotiations would appear to be a reference only to the Minnesota land that was to be ceded to the United States pursuant to the 1854 treaty. His words indicate that he understood the Indians were giving up title to that land. There is no justification for construing Chief Buffalo's remarks either as relating to the territories previously ceded or as a "general release" of all Indian claims and rights in those territories.

In addition to his reliance on Chief Buffalo's remarks, Judge Doyle found those aspects of the 1854 treaty pertaining to the Minnesota cession relevant when read *in pari materia* with the Treaties of 1837 and 1842.

B. In Pari Materia Analysis

The portions of the 1854 treaty relevant to this analysis are Articles 1, 2, and 11. Article 1 records a cession of the territory held by the Lake Superior Chippewa residing in Minnesota to the United States. Article 2 grants reservations to, *inter alia*, the LCO band and the Minnesota Chippewas who ceded their land pursuant to Article 1. Article 11 states, in part: "And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President." As a result of this provision, the Chippewas residing in Minnesota obtained treaty-recognized usufructuary rights on non-reservation lands.

The district judge and the defendants think Article 11 suggests that the LCO band, like other Chippewa bands which ceded land pursuant to the earlier treaties, was relinquishing its usufructuary rights in 1854. As stated by the district court: "Had the parties intended the 1854 treaty to continue to preserve those rights in the lands ceded in 1837 and 1842, it is reasonable to believe that they would have made it explicit in 1854." 464 F.Supp. at 1359. The district judge reached this conclusion because usufructuary rights were specifically recognized in Article 11.

We disagree. The Treaties of 1837, 1842, and 1854 are consistent in that each treaty includes both a cession of land and a reservation of usufructuary rights on the ceded land by those Indians relinquishing their territory. The LCO band had ceded its territory pursuant to the two earlier treaties in which its reservations of usufructuary rights were explicit. Omission of any reference to those rights in the 1854 treaty suggests that the LCO band believed their right to use ceded land for traditional pursuits to be secure and unaffected by the 1854 treaty.

We are not persuaded that either the remarks of Chief Buffalo or the absence of an explicit reservation of the

LCO's usufructuary rights in the 1854 treaty compel the conclusion that occupancy and usufructuary rights were understood by the Indians and the Government to be inextricably linked at the time of the 1854 treaty negotiations. We turn therefore to a somewhat different line of analysis relied on by Judge Doyle and urged by the defendants.

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C. Relevance of the 1850 Removal Order

This line of analysis posits that the Indians relinquished their usufructuary rights on most of the land previously ceded in return for the Government's promise, in Article 11 of the Treaty of 1854, that they would not be removed from the land completely. That article, in a portion not quoted above, states that the "Indians shall not be required to remove from the homes hereby set apart for them."

This argument is not persuasive in light of considerable evidence in the record indicating the Indians believed both that the Government had abandoned its removal policy by 1854 and that they could be removed only for misbehavior.

First, the Indians had been told by President Fillmore that he would countermand the Removal Order and that the annuities would be paid at a location nearer their homes henceforth. There is evidence that the 1853 and 1854 annuities were indeed paid to the Indians at nearby LaPointe. It is reasonable to conclude that the Indians therefore believed the United States had abandoned efforts to resettle them in more western territory.

It is not necessary for this court to reach a legal conclusion as to whether President Fillmore had the

power to or in fact did countermand the Removal Order. Similarly, it is not essential to decide that the Government had repudiated its "removal policy" and would henceforth pursue a "reservation policy." The defendants' argument turns on what the Indians *believed* as a result of the 1850 Removal Order. We conclude only that the evidence suggests the Chippewa *believed* precisely the opposite of what the defendants urge.

Second, as discussed *supra*, the Chippewas believed that they had been promised the right to remain on and use the ceded land unless they misbehaved. They hadn't misbehaved. They were surprised and deeply disturbed by the Removal Order. That Order was subsequently not enforced. These facts suggest that the Chippewa more likely understood that the Government had acknowledged their rights to be subject to extinguishment only upon misbehaving.

D. Summary

Nothing in the record compels the conclusion that the LCO band understood the Treaty of 1854 as abrogating their treaty-recognized usufructuary rights. Similarly, nothing compels the conclusion that the Government intended such an extinguishment.

Turning first to the Indian understanding of the treaty, the LCO band was heavily dependent on the exercise of their usufructuary activities throughout the ceded region at the time of the treaty negotiations. Even if some Indians contemplated turning to agriculture as a principal means of subsistence, there is no indication such a transition had been implemented to any extent at the time of the treaty. Second, the Indians in fact continued their hunting and fishing activities on the ceded territory long after their reservations were created pursuant to the 1854 treaty. Third, as discussed *supra*, the sequence of events following the attempted removal

of the Chippewas in 1850 would logically have confirmed their belief that removal and extinguishment of usufructuary activities could be avoided if they did not harass white settlers. Fourth, as also discussed above, the inclusion in the 1854 treaty of a reservation of usufructuary rights by the Minnesota Chippewas suggests, in our view, that the LCO band believed their usufructuary rights to be secure and unaffected by the treaty.

As to the intentions of the Government, it is noteworthy that the Removal Order of 1850 referred specifically to the extinguishment of usufructuary rights as well as ordering removal of the Chippewas. This suggests that the Government knew the Indians did not understand the exercise of usufructuary rights to be dependent on their permanent occupancy of the land; further, it illustrates that the United States was well able to draft an explicit statement abrogating such rights. The Government's provision of guns and ammunition to the Indians pursuant to the 1854 treaty suggests that the United States did not envi-

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sion the Indians abandoning their traditional pursuits.

The rationale employed by Judge Doyle and the arguments advanced by the defendants at best support the implied abrogation of the LCO band's usufructuary rights pursuant to the 1854 treaty. As developed at length in Section IV, *supra*, the extinguishment of treaty-recognized rights by subsequent Congressional act will be found only if it is *clear* that such a termination was intended. The evidence supporting relinquishment or abrogation in the instant case fails to meet that standard. We conclude therefore that the LCO band's usufructuary

rights were neither terminated nor released by the 1854 treaty.¹³

CONCLUSION

As to the collateral matters posed by this appeal, the tribe's motion to dismiss the defendants' cross-appeal in *Ben Ruby* and *LCO* is denied. The defendant's motion to strike the tribe's collateral estoppel argument and the tribe's references in their brief to documents not in the record are denied.

The LCO band enjoyed treaty-recognized usufructuary rights pursuant to the Treaties of 1837 and 1842. The Removal Order of 1850 did not abrogate those rights because the Order was invalid. These aspects of our holding are consistent with the conclusions reached by the judge below. We disagree with the district judge's conclusion that the Treaty of 1854 represented either a release or extinguishment of the LCO's usufructuary rights. At most, the structure of the treaty and the circumstances surrounding its enactment *imply* that such an abrogation was intended. Treaty-recognized rights cannot, however, be abrogated by implication. The LCO's rights to use the ceded lands remain in force.

¹³On March 22, 1982, this court denied the tribe's motion to include in the record of this appeal certain documents the tribe believes relevant to construction of the 1854 treaty if a remand on that issue is required. In its combined brief, the tribe again referred to these documents. The defendants moved to strike those portions of the LCO combined brief. This motion has not yet been ruled upon.

In resolving this case, the panel has construed the references to these historical documents as the tribe suggests: a demonstration that more evidence might be presented in support of the tribe's position regarding the 1854 treaty if a remand on that issue were required. As our disposition makes clear, no such remand is warranted. We have reached this conclusion without reference to the documents that are in controversy.

For the purpose of clearing the docket of the outstanding motion, we order that it is hereby denied.

Having considered all the arguments urged by the parties, the district court's summary judgment in favor of the defendants as to the continued existence of the LCO's usufructuary rights is reversed. The exercise of these rights is limited to those portions of the ceded lands that are not privately owned.¹⁴ The case is remanded to the district judge with instructions to enter judgment for the LCO band on that aspect of the case and for further consideration as to the permissible scope of State regulation over the LCO's exercise for their usufructuary rights.

REVERSED AND REMANDED.

¹⁴This court has understood the LCO band's argument to be limited to those portions of the ceded lands that have not passed into private ownership. To the extent that the LCO band might be claiming a broader right — such as the right to engage in usufructuary activities on land that is privately owned but utilized for sport hunting and fishing — we find that the claim is inconsistent with the Indians' understanding at the time of the cession treaties that their rights could be limited if the land were needed for white settlement, *see* Section I, *supra*.

[464 F. Supp. 1316]

UNITED STATES of America, Plaintiff,

v.

Jerome BOUCHARD, Defendant.

UNITED STATES of America, Plaintiff,

v.

BEN RUBY AND SONS, ET. AL.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS, and Frederick Tribble and
Michael Tribble, Individually and on behalf of all persons
similarly situated, Plaintiffs,

v.

Lester P. VOIGT, Individually and as Secretary of the
Department of Natural Resources, State of Wisconsin,
Norman L. Yackel, Individually, as District Attorney for
Sawyer County, Wisconsin, and as a representative of
the group of all District Attorneys and Assistant District
Attorneys in the ceded territory, Larry Miller and Milton
Dieckman, Individually, as Conservation Wardens for
the Department of Natural Resources, State of Wisconsin,
and as representatives of the group of all conservation
wardens in the ceded territory, Donald Primley, Indi-
vidually, as Sheriff for Sawyer County, Wisconsin, and
as a representative of the group of all ex officio Conserva-
tion Wardens in the ceded territory, their agents, assist-
ants, successors, employees, attorneys and all those
acting in consort with them or at their direction,
Defendants.

Nos. 76—CR—70, 72—C—366, 74—C—313.

United States District Court,

W. D. Wisconsin.

Sept.20,1978.

Actions were brought involving property interests and hunting and fishing rights of Chippewa Indians in northern Wisconsin. The District Court, James E. Doyle, J., held that: (1) statute regulating hunting, trapping, or fishing on Indian land required, as

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element of offense, that United States hold legal title to land at issue in trust for Indians; (2) title to navigable waterways within reservation passed to state in 1848 and United States did not regain title from state after that time, so that indictment charging defendant with violating statute regulating hunting, trapping, or fishing on Indian land had to be dismissed; (3) by signing 1837 treaty, Chippewa Indians relinquished their aboriginal right of occupancy to land at issue; (4) President's removal order of 1850 was not authorized by treaties of 1837 or 1842, was beyond scope of President's powers, and was without legal effect; (5) 1854 treaty terminated Chippewa's right of permissive occupation in territory ceded in 1837 and 1842 and not included in reservation contemplated by 1854 treaty; (6) under Wisconsin Enabling Act and 1873 agreement fixing reservation boundaries, state of Wisconsin obtained title to sections 16 in dispute, and (7) Chippewa Indians did not have right to hunt, fish and gather wild rice without state regulation or control in nonreservation areas ceded by Indians in 1837 and 1842 treaties.

Ordered accordingly.

Headnotes omitted.

[464 F. Supp. 1321]

OPINION AND ORDER

JAMES E. DOYLE, District Judge.

These three cases all require a determination of the property interests and hunting and fishing rights of the Chippewa Indians in northern Wisconsin. In varying degree, all involve interpretation of treaties between the Chippewa and the United States in 1837, 1842 and 1854, as well as an executive order issued in 1850.

United States v. Bouchard is a criminal proceeding brought pursuant to 18 U.S.C. § 1165. The United States charges that defendant trespassed upon a waterway belonging to the Bad River Tribe and held in trust by the United States, for the purpose of fishing. Defendant contends that the waterway does not belong to the Indians or the United States, but became the property of the State of Wisconsin upon its admission to the Union in 1848. Plaintiff argues that the rights granted to the Chippewa in the 1842 treaty prevented the State's acquisition of title to the waterway; alternatively, that the 1854 treaty validly granted the Bad River Tribe exclusive use of the waterway at issue.

United States v. Ben Ruby and Sons, et al. is a civil action brought by the United States for a declaratory judgment that it holds title in fee to three sections of land for the benefit of the Lac Courte Oreilles Band, and that none of the defendants enjoys any interest in these sections. Each section is a section 16. The 1846 Act of Congress enabling Wisconsin to achieve statehood granted to the prospective State for school purposes every section 16 "not otherwise disposed of." The United States argues that at the time the State's title might have vested pursuant to the 1846 Act, the sections 16 at issue had been "otherwise disposed of" by virtue of the Indians' right to occupy those lands pursuant to the treaties of 1837 and 1842. The State and the other defendants, whose claimed

interests depend upon State grants, argue that the Indians' right to occupy the lands was terminated by a Presidential order in 1850, allowing the lands to pass to the State. The effect of executive action in 1873 finally defining the boundaries of the Lac Courte Oreilles reservation is also in dispute.

In Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. Voigt, et

[464 F. Supp. 1322]

al., the Indians seek a declaratory judgment that they have the right, pursuant to the treaties of 1837 and 1842, to hunt and fish on non-reservation lands in northern Wisconsin free from State regulation. Defendants argue that any such right was extinguished by the executive order in 1850, or by the 1854 treaty.

[1] A treaty between the United States and an Indian tribe must "be construed as the Indians would have understood it . . . as disclosed by the practices and customs of the Indians at the time the treaty was negotiated . . . and by the history of the treaty, the negotiations that preceded it, and the practical construction given the treaty by the parties . . ." *United States v. Top Sky*, 547 F.2d 486 at 487 (9th Cir. 1976). Accordingly, in an effort to construe the treaties at issue in the appropriate context, I have made extensive findings of fact, as hereinafter set forth under the heading "Facts." Not all of these findings are relevant to all three cases to which this consolidated opinion is addressed, but each finding is considered relevant to one or more of the three cases.

Facts

The Chippewa Indians settled in what is now northern Wisconsin and Minnesota during the latter part of the seventeenth century. They lived in small bands

throughout the territory, and made their living by hunting, fishing, and harvesting wild rice and maple sap. The Lake Superior Tribe lived in the northern part of their territory along the Lake Superior shore; the Mississippi Tribe lived farther south. The Chippewa's land became a part of the United States with the establishment of the Northwest Territory in 1787. Significant numbers of white people began to settle in the territory, and Wisconsin was established as a separate territory in 1836.

During approximately the first half of the nineteenth century, the federal government's Indian policy was to buy Indian lands where white settlement was advancing, and to remove the Indians to places farther west. Pursuant to that policy, Wisconsin Territorial Governor Henry Dodge was authorized in 1837 to negotiate a treaty with the Chippewa Indians for the purchase of some of their Wisconsin lands. The appropriations act for the Indian Department, dated March 3, 1837, included \$10,000 for "holding treaties with the various tribes of Indians east of the Mississippi River, for the cession of lands held by them . . . and for their removal west of the Mississippi. . . ." On May 13, 1837, the Office of Indian Affairs wrote to Treaty Commissioner Dodge about the government's purposes in negotiating a treaty. The letter noted that the land was valuable for its pine timber and that a treaty would open the territory for white settlement.

The notes of Verplanck Van Antwerp, secretary of the treaty council, indicate that when all of the expected Indian chiefs had arrived at the council grounds in July, 1837, Commissioner Dodge told them that the government wished to buy a portion of their lands, and showed them a map of the desired land. He explained the map thoroughly, and told the Chiefs that the area was barren of game and not good for agriculture, but it "abounded in pine timber, for which their Great Father the President of the United States wished to buy it from them, for the use of his white children. . . ."

The next day, the Indians replied through their spokesman Ma-ghe-ga-bo. He told Commissioner Dodge the Chiefs wanted to reserve the streams in the area and the maple trees to collect sap, as well as the right to hunt in the lands. He stated that the Indians would like annuities in money and goods for sixty years, saying that at the end of that time, their grandchildren could negotiate for themselves. He also asked for provisions for the half-breeds and traders. He pointed out 19 Indian villages within the desired land. Finally, all of the chiefs who agreed to selling the land arose, and Ma-ghe-ga-bo said that the Indians agreed to grant the government the land. Commissioner Dodge responded, saying that

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the "Great Father" never buys land for a term of years, but that he would agree on behalf of the President to grant the Indians the "free use of the rivers, and the privilege of hunting upon the lands you are to sell to the United States during his pleasure. If you sell these lands, you must sell them as all the nations of Indians have done. . . ."

On the next day, Aish-ke-bo-gi-ko-she spoke on behalf of the Chiefs, saying:

Your children are willing to let you have their lands, but they wish to reserve the privilege of making sugar from the trees, and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in [the] country. It is hard to give up the lands. They will remain, and can not be destroyed — but you may cut down the trees, and others will grow up. You know we can not live, deprived of our Lakes and Rivers; There is some game on the lands yet; and for that reason also, we wish to remain upon them, to get a living. Sometimes we scrape of the trees and eat of the bark. The Great Spirit above,

made the Earth, and causes it to produce, which enables us to live.

Commissioner Dodge replied in part: "I will make known to your Great Father, your request to be permitted to make sugar, on the lands; and you will be allowed, during his pleasure, to hunt and fish on them. It will probably be many years before your Great Father will want all these lands for the use of his White Children." The treaty proceedings concluded with discussions about annuities and provisions for half-breeds and traders; then Commissioner Dodge had the treaty read to the Indians, and it was signed. Among the Indians signing the 1837 Treaty of St. Peter's were Chiefs from LaPointe and "Lake Courteoville."

The accounts of what was said, of course, are only of what was understood by the white men. Van Antwerp commented after one particularly clumsy passage in his notes: "This of course is nonsense — but is given literally as rendered by the Intrepeters [sic] who are unfit to act in that capacity. I presume it to mean. . . ."¹

The Treaty of 1837 states in Article 1 that the Chippewa nation of Indians "cede to the United States all that tract of country" described in the article.² The United States agreed to pay annuities in the form of goods and money, to distribute money to half-breeds, and

¹Benjamin Armstrong, a trader who lived in Chippewa territory, reported in a book about his experiences with the Indians that the commissioners of the 1837 treaty told the Indians that the "great father" had sent them to buy their pine timber and minerals, not their lands, because it was too cold in the country for farming. Armstrong, however, stated that the Commissioners were Col. Snelling and Maj. Walker, which is contradicted by the evidence. It also seems, in speaking of the desire for mineral lands, that he many have confused in his memory the 1837 and 1842 treaties. Thus I cannot give much weight to his account of the 1837 treaty negotiations. See B. G. Armstrong, *Early Life Among the Indians* 10-12 (1892, Ashland, Wis.).

²See Appendix A for maps showing the territory ceded.

to pay some Indian debts to traders. Article 5 states: "The privilege of hunting, fishing and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States."³

The present Lac Courte Oreilles reservation is within the territory ceded by the 1837 treaty.

On March 3, 1841, Congress appropriated \$5,000 for the expenses of negotiating a treaty to extinguish Indian title to lands in Michigan. At least some of the Indian title to Michigan lands was held by Chippewa bands.

In a letter dated July 27, 1842, Robert Stuart, Superintendent of the Michigan Indian Agency wrote to the Secretary of War that since the March, 1841 appropriation it had been learned that the mineral district

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Congress wished to acquire extended beyond northern Michigan into Wisconsin. He recommended purchase of the Indian territory in northern Wisconsin, as well as Michigan, pointing out that "the main importance of immediately acquiring this territory, is owing to its supposed great mineral productivity. . . ." Stuart also noted that it would not be necessary to remove the Indians in the ceded area until the land was required for white settlement.

On August 1, 1842, Stuart was appointed commissioner to negotiate the treaty with the Chippewa. His instructions from the Office of Indian Affairs stated that he could negotiate for cession of lands west of Michigan, and stressed the importance of gaining the mineral lands as well as the importance to commerce of controlling the south shore of Lake Superior. Although Indians might

³The treaty is set forth in full at Appendix B. See also 7 U.S. Statutes at Large (Indian Treaties) 536.

have to remove from specific mineral lands immediately, the instructions said, general removal from the territory would not take place for a "considerable time."

In his annual report to the Bureau of Indian Affairs dated October 28, 1842, Stuart reported that he had met with the Chippewa at LaPointe and concluded a treaty whereby the Chippewa agreed to sell all of their lands between Lake Superior and the Mississippi. He reported that the mineral district was "extensive and valuable" and that the fisheries along the shore and islands of Lake Superior were plentiful "and must at no distant period become a considerable source of revenue to our citizens. . . ." He also reported that the Lake Superior tribe had feuded with the Mississippi tribe about annuities under the 1837 treaty; therefore the new treaty arranged for a sharing of annuities under both treaties.

In the 1842 treaty, the Chippewa of the Mississippi and Lake Superior ceded to the United States all the country described in the treaty, north of the 1837 cession.⁴ Article II states:

The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

Articles III and IV pertain to annuities, provisions for half-breeds, and the lands to which the Indians would remove. Article V points out that the land ceded by the 1837 treaty and the 1842 treaty have been understood as

⁴Maps showing the territory ceded are at Appendix A; the full text of the treaty is at Appendix B. *See also* 7 U.S. Statutes at Large (Indian Treaties) 591.

belonging in common to both the Lake Superior and Mississippi Chippewa and that the Lake Superior Chippewa had been denied participation in the 1837 treaty annuities. It provides that each tribe will share equally in the annuities under both treaties. Article VI states: "The Indians residing on the Mineral district, shall be subject to removal therefrom at the pleasure of the President of the United States."

The present Bad River reservation is within the territory ceded by the 1842 treaty.

The December 5, 1842, report on the treaty by the Commissioner of Indian Affairs to the Secretary of War stated that the treaty resulted in acquisition of land, minerals, and command of the south shore of Lake Superior. The report of the Superintendent of the Wisconsin Indians to the Commissioner of Indian Affairs in November, 1843, pointed out that exclusive possession of the Lake Superior shore was commercially important and would be more so as settlements and mineral trade expanded.

White settlers began moving into the ceded territory very soon after the treaty was signed. In a letter dated August 1, 1843, the LaPointe sub-agent for Indian Affairs reported to the Wisconsin Territorial Governor that whites had settled on principal rivers and thoroughfares, and were selling whiskey to the Indians. A report to the Secretary of War on November 1, 1843, showed that licenses had been issued for mineral exploration in the ceded area. Copper mining along the southern shore of

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Lake Superior boomed in the 1840's and 1850's.

On August 6, 1846, Congress enacted a law to enable Wisconsin to form a constitution and establish a state government. The act provides in Section 3 that the

navigable waters of the state would be "common highways, and forever free," and that the state would be admitted to the Union "on an equal footing with the original States in all respects whatsoever." Section 7 Part 1 provides that within the public lands lying within the boundaries of the prospective state, section 16 in every township would be granted to the State for the use of schools, except "where such section has been sold or otherwise disposed of." No part of the sections 16 in Township 39 North, Range 7 West, Township 39 North, Range 8 West, and Township 40 North, Range 8 West, all in the Fourth Principal Meridian, Sawyer County, Wisconsin, had been sold by the United States to anyone at any time through March 1, 1873. They were public lands.

Wisconsin was admitted to statehood by Act of Congress in 1848.

At least as early as 1846, the Commissioner of Indian Affairs began suggesting in his annual reports that the Chippewa be removed to the land set apart for them west of the Mississippi. In a report dated November 30, 1846, the Commissioner promoted removal, saying that in their then widely dispersed state, little could be done to give the Chippewa "the benefit of the benevolent policy of the government for the improvement of the Indian race." A change in the disposition of the tribe, and its members' intellectual, moral and social development could only be brought about, he wrote, by concentrating them "within fixed and reasonable limits," where "game will soon become scarce, and they will be compelled gradually to resort to agriculture and other pursuits of civilized life. . . ." Similarly, the Superintendent of Indian Affairs for the Territory of Wisconsin wrote in 1846 that the Chippewa's "condition as a people" would be improved by removal. And the LaPointe sub-agent reported in 1846 that removal would be a step toward the improvement of the Chippewa. He also reported that numerous whites had settled on the

lower Mississippi and were selling whiskey to Indians in that area, causing "depredations upon the property of the settlers, and difficulties between individuals, whites and Indians."

The Commissioner of Indian Affairs took steps during the summer of 1847 to achieve his goal of removal. Two government agents were dispatched to seek Chippewa agreement to a plan of resettlement, but those efforts were unsuccessful.

On November 30, 1847, the Commissioner of Indian Affairs wrote in his annual report: It would be far better for [the Chippewa] if they were all concentrated in their country west, where they could be almost effectually protected from the pernicious influences now operating to bring down upon them misery and degradation." The 1847 report if the LaPointe sub-agent records two incidents of violence between the Chippewa and white settler. In one, the Indian was acquitted of murder on the ground of self defense; in the other, the agent investigated and concluded that the whites were at fault. He concluded generally;

I fear, that in our accounts of outrages and crime, we have done the Chippewas, if no other tribe, injustice in many cases; for I find on comparing them with almost any civilized community of the same size, for four years, there will be found the smaller aggregate of crime on the part of the savage; and every crime of any magnitude which has been committed may be traced to the influence of the white man.

In the 1848 annual report of the Commissioner of Indian Affairs, he reported generally on progress toward the Bureau's goal of moving the Indian population to lands west of the Mississippi River. He noted that most Wisconsin Indians had been removed, leaving only the Chippewa who "are remaining by sufferance on lands

which, looking only to their own benefit, they should soon be required to remove." While he does not explain the basis of that recommendation, much of his report deals with the advantages of confining Indian tribes to

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smaller grounds than they had previously roamed, forcing them to turn to agriculture for subsistence and making it easier for government officials to "civilize" them. He also pointed out that such a policy promotes efficiency, requiring few agents to supervise more concentrated groups of Indians. The LaPointe sub-agent's 1848 report mentions no conflicts between Indians and whites.

In 1849, the Commissioner of Indian Affairs again recommended removal, as well as purchase of the remaining Chippewa lands east of the Mississippi River. The two reasons given were "for tranquility of citizens who suffer annoyance and loss from depredations" and for the "permanent welfare" of the Indians "where, confined within narrow limits, they will be compelled as the game becomes scarce, to give up the chase, and their wild and unsettled mode of life, and to resort to agriculture and other civilized pursuits. In such a situation, too, the Government . . . would have a better opportunity effectively to bring to bear upon them its policy and measures for the civilization of our Indian tribes. . . ." A third reason for removal is suggested by the Commissioner's comment that removal and purchase of the lands east of the Mississippi would effectively accomplish "the great policy of transplanting the Indian tribes from the midst of our white population and within state limits . . . to new countries specifically set apart for them."

The report of the LaPointe sub-agent to the Commissioner of Indian Affairs in 1849 notes some "disturbances and outrages" between Indians or between whites and Indians on the St. Croix and Chippewa rivers, and at

Fond du Lac⁵ and St. Croix Falls. He refers to a separate report on the disturbances, which I have not seen. The sub-agent expressed the opinion that sales of whiskey to the Indians by whites was the cause of most difficulty between the two races, and acknowledges the possible validity of the Indian complaint that when Indians were guilty of acts against whites they were punished, while whites who committed crimes against Indians went free. He concluded that the "propriety of removing those bands . . . is becoming every year more and more manifest."

On February 7, 1849, a petition by the Lake Superior Chippewa was introduced in the United States Senate and House of Representatives. The Indians sought from Congress a "donation of 24 sections of land, covering the graves of our fathers, our sugar orchards, and our rice lakes and rivers, at seven different places now occupied by us at villages. . . ." The places listed included "LCotore" and "LaPoint." The petitioners stated that they sought the land for the purposes suggested, as well as for permanent cultivation and permanent homes, and expressed a fear of being driven north of the British line or west among wandering, "vicious" tribes.

On October 11, 1849, the Legislative Assembly of the Minnesota Territory passed a joint resolution requesting the President to remove the Chippewa to an unsettled area "to ensure the security and tranquility of the white settlements in an extensive and valuable district of this Territory."

The Commissioner of Indian Affairs and the Secretary of the Interior recommended a Presidential order of removal in 1850, without stating their reasons, and the President of the United States issued an executive order

⁵The reference to Fond du Lac is not to the site of the modern city of Fond du Lac, Wisconsin, but rather to a location on the shore of Lake Superior.

on February 6, 1850, revoking the privileges of occupancy granted to the Indians in the Treaties of 1837 and 1842, and ordering them to remove to Chippewa lands in Minnesota.⁶ The order states:

The privileges granted temporarily to the Chippewa Indians of the Mississippi, by the fifth article of the treaty made with them on the 29th of July 1837 "of hunting, fishing and gathering the wild rice

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upon the lands, the rivers and the lakes included in the territory ceded" by that treaty to the United States, and the rights granted to the Chippewa Indians of the Mississippi and Lake Superior by the second article of the treaty with them of October 4th, 1842, of hunting on the territory which they ceded by that treaty, with the other usual privileges of occupancy until required to remove by the President of the United States, are hereby revoked and all of the said Indians remaining on the lands ceded as aforesaid, are required to remove to their unceded lands.

Armstrong reported the Indians' surprise in his book:

No conversation that was held at this time [during the 1842 treaty negotiations] gave the Indians an inkling or caused them to mistrust that they were ceding away their lands, but supposed that they were simply selling the pine and minerals, as they had in the treaty, of 1837,

⁶The October 21, 1850, report of the Minnesota Superintendent of Indian Affairs to the Commissioner of Indian Affairs contains an estimate that at that time about 5,000 Chippewa were parties to, and were receiving annuities under, the treaties of 1837 and 1842.

and when they were told in 1849, to move on and thereby abandon their burying grounds—the dearest thing to an Indian known—they began to hold councils and to ask each as to how they had understood the treaties, and all understood them the same, that was: that they were never to be disturbed if they behaved themselves. Messengers were sent out to all the different bands in every part of their country to get the understandings of all the people, and to inquire if any depredations had been committed by any of their young men, or what could be the reason for this sudden order to move. This was kept up for a year, but no reason could be assigned by the Indians for the removal order.

Early Life Among the Indians, supra at 12.

Armstrong's report that the Indians learned of no depredations which could have been the reason for removal is confirmed by a letter from the Chippewa Indian Chiefs to the Commissioner of Indian Affairs on November 6, 1851, in which they stated in part:

It is true, our Father that some of our countrymen have had trouble with the whites; but this is not true of us who live on the Lake. We have never shed the blood of the Whites, nor killed their cattle; nor done them injury; and we are not in their way. And why is [it] that we now hear this order to remove? We do not understand it.

On June 30, 1850, Chippewa Chief Hole-in-the-day wrote a letter to the white people which was published in a Minnesota paper. He said the Indians were told by the treaty commissioner in 1842 that they would not be removed for at least 20 years, and probably never. The commissioner had also said that the Great Father had no need of the land but wanted only the copper on it, the Chief continued. "It was on the strength of this promise,

and nothing else, that our chiefs signed the treaty," he concluded. Similarly, in a letter to the Commissioner of Indian Affairs dated January 21, 1851, the Secretary of the American Board of Commissioners for Foreign Missions wrote that during the 1842 treaty negotiations:

The Indians were told that they could remain where they were for an indefinite period, except so far as they might be required to give place to miners; and the Commissioner said to them. "You and I shall never see the day when your Great Father will ask you to remove." Had it not been for this assurance, it is presumed, the treaty would never have been consummated.

The Secretary added that he could foresee no danger of an "unpleasant collision" with white settlers if the Indians were allowed to remain. This version of the treaty is also corroborated by C. Mendenhall, a miner who wrote a letter to the Commissioner of Indian Affairs on January 6, 1851. He said that he was present at the 1842 treaty council, and that the treaty commissioner told the Indians there that they would be permitted to occupy their lands as long as they behaved well. The commissioner illustrated the point by saying, Mendenhall reported, "the purchase he wished to make was like buying a pack of furs of one of them, paying for it, then handing it back, for the Indians own use." Mendenhall add-

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ed that he was aware of only one minor depredation of whites by Indians three years earlier when a group of Indians had killed a pair of oxen. He said the miners considered the Indians an advantage, not a nuisance.

W. W. Warren, a farmer who was employed by the government to teach farming to the Indians, wrote to Indian Superintendent Alexander Ramsey on January

21, 1851, saying he had recently visited a number of Indian villages and attended councils about the removal order with the chiefs. He reported great dissatisfaction with the removal order among the Chippewa. The Indians had understood the treaty commissioners to say that the government was interested only in copper, not their lands, and they they would not be removed during the term of their annuity, and probably never. "It was under this verbal understanding and only this, that the treaty was signed by the Chippeway [sic] Chiefs," he concluded.

Finally, Indian Agent Henry Gilbert wrote in his 1853 report to the Commissioner of Indian Affairs that the removal order had caused great fear and distrust among the Chippewa and was impeding efforts to help them. He explained.

The Indians informed me that when the [1842] treaty was made the Commissioner assured them that the clause providing for their removal was only inserted as a mere matter of form—that a compliance with it would never be urged or insisted upon by the Government and that their annuity would always be paid regularly at LaPointe. The Interpreter Mr. Johnson who officiated on that occasion was present with me and corroborated their statement. I saw several other persons who were present at that time and they all concur in saying that without that assurance the Indians would never have signed the Treaty. The memory of an Indian is very tenacious. He treasures up everything that is said by a Government officer and regards his statements and verbal assurances as equally binding upon the Government as the formal stipulation of a Treaty.

In an effort to achieve the removal to western lands, the place for payment of the Chippewa's annuities was

changed from LaPointe to Sandy Lake in the Minnesota Territory in late fall, 1850. The trip caused great hardship to the Indians; many died while waiting for the payments at Sandy Lake, or while returning to their homes afterward.

In a letter dated February 28, 1851, Indian Sub-agent Watrous wrote to Minnesota Territorial Governor Ramsey suggesting a plan of making annuity payments in early spring and late fall, in the hopes of inducing the Indians to stay at Sandy Lake rather than returning to their ceded lands in Wisconsin. Watrous was subsequently appointed superintendent of removal; Reverend William Boutwell was appointed assistant superintendent of removal.

On August 25, 1851, Indian Commissioner Lea of the Office of Indian Affairs sent a telegram to Superintendent Watrous, stating: "Suspend action with reference to the removal of Lake Superior Chippewas for further orders." On September 5, 1851, Commissioner Lea confirmed that the suspension had been ordered by the Secretary of the Interior until the President could decide whether the Indians would be permitted to remain on their lands, and that he had sent a telegram so informing Superintendent Watrous.

On September 18, 1851, Assistant Superintendent Boutwell wrote to Governor Ramsey, reporting on his efforts to gather the Chippewa at LaPointe and to begin their removal to Minnesota. He detailed a number of problems encountered, including Indian insistence that they had a right to remain on the ceded territory, but reported that a compromise was achieved whereby the annuity would be paid at Fond du Lac, that the Indians would be fed for one year and aided in building and establishing agriculture, and that the agent would recommend that a delegation of Chiefs be given permission to visit Washington, D. C. Boutwell noted that he

had received a telegraphic dispatch on September 3 ordering him to suspend removal. However, he com-

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ments: "The purport of this order remains a secret, and as the Indians are ready to go I shall start them."

Agent Watrous submitted his annual report, dated September 20, 1851, to Governor Ramsey, in which he stated that the removal commenced in May had met "many adverse interests, and counter currents to contend against," but that the entire removal had been accomplished with just the exception of a few small bands. He added that the muster rolls will show when completed that 3000 Chippewa had been removed, while 900 remained on the ceded lands. Finally, Watrous mentions:

Reasonable apprehensions may be entertained of those that have removed returning to their old homes, and that the citizens of Wisconsin and Michigan will again be annoyed by their depredations and plunder. To guard against this, a military post located at the head of Lake Superior, or a treaty (as before alluded to) is believed indispensable.

Superintendent Ramsey reported Watrous's observations to the Commissioner of Indian Affairs in an annual report dated November 27, 1851.

Chippewa Chief Buffalo wrote a letter to the Commissioner of Indian Affairs dated November 6, 1851, outlining the Indians' view of the 1850-51 removal efforts. He complained that the 1850 winter annuity payments at Sandy Lake were late and provisions were poor, causing hardship and death among the Indians both at Sandy Lake and on the difficult trip home. He also complained of a removal to Fond du Lac during the summer of 1851 where the Indians again found poor provisions, and

returned again to their homes. He asked that all future payments be made at LaPointe.

On December 15, 1851, Agent Watrous wrote to Superintendent Ramsey, saying "As active operations have now ceased in the removal of the Chippewas, I deem it proper to make a general statement, embodying the expense from the time the removal commenced, its results, and termination." He stated that the enrolling agent showed a roll of 1100 removed Indians and that others were "daily coming in." He added that if the policy of paying annuities only to those who leave their lands were continued, he would predict that 1500 to 1600 or more would remove of their own accord.

The Indians were greatly dissatisfied and disgusted with the provisions given them during the winter of 1851, however, and a group of Chiefs and braves left on April 5, 1852, with Benjamin Armstrong to go to Washington to see their "great Father." Chief Buffalo dictated a memorial to President Fillmore on June 12, 1852. In it, he again explained his understanding that the treaty annuities were always to be paid at LaPointe, and that "if we were good men, that we should not only be permitted to remain on our lands for fifty, but for one hundred years to come, and these were the words of your Commissioner." He further stated that the Chippewa had been peaceable to white men, and had not been in their way. He beseeched the President to order his agents to comply with the treaty of 1842, as the Indians understood it. Armstrong reported that the delegation did meet with the President and explained their grievances about the removal. He said that President Fillmore told the delegation that he would countermand the removal order and that payments would be made at LaPointe as before. The President gave Chief Buffalo a written instrument explaining the promises he had made, and the delegation returned home. There is no current record of the President's contravention of the removal order that I am

aware of. The Indians left Washington for their homes in late June, 1852.

Armstrong reported that the annuities for 1852 were paid at LaPointe, in mid-October. During that assembly for the payments, the President's letter was explained to the Indians and Chief Buffalo told them there was yet one more treaty to be made with the President, "and he hoped in making it they would be more careful and wise than they had heretofore been and reserve a part of their land for themselves and their children." *Early Life Among the Indians, supra* at 32.

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In his October 26, 1852, report to the Commissioner of Indian Affairs, however, Superintendent Ramsey said that the Chippewa had been told that there would be no further payment of annuities upon ceded lands, and that a rigid adherence to paying annuities only to those who remove was the best way of accomplishing a removal which had met substantial resistance.

Armstrong reported that the 1853 and 1854 annuity payments were also made at LaPointe. The LaPointe location of the 1853 annuity payments is corroborated by the December 14, 1853, report of Indian Agent Henry Gilbert. Gilbert's report stated that he met with the Indians several times, learning that the "great terror of their lives" was the removal order, and that they would probably "sooner submit to extermination than comply with it." Gilbert also reported that the Indians and the whites in the area were living peacefully and harmoniously with one another.

In the annual report of the Office of Indian Affairs dated November 25, 1854, the Commissioner stated that a few small bands of Lake Superior Chippewas "still occupy their former locations on lands ceded by the

treaties of 1837 and 1842. It has not, thus far, been found necessary or practicable to remove them." The Commissioner also stated that "it may be necessary to permit them all [the Chippewas] to remain, in order to acquire a cession of the large tract of country they still own east of the Mississippi, which, on account of its great mineral resources, it is an object of material importance to obtain. They would require but small reservations; and thus permanently settled, the efforts made for their improvement will be rendered more effectual."

The Commissioner's suggestion of establishing reservations for the Chippewa was consistent with a change in federal Indian policy in the 1850's, from one of removing Indians to western lands to one of setting aside small reservations for their permanent homes. Additionally, the reservation idea appeared to be acceptable to the white citizens of Wisconsin. On February 27, 1854, the Wisconsin legislature sent a memorial to the President and Congress, stating:

"MEMORIAL to the President and Congress of the United States, relative to the Chippewa Indians of Lake Superior.

"To His Excellency the President of the United States, and to the Senate and House of Representatives in Congress assembled:

"The Memorial of the Legislature of the State of Wisconsin respectfully represents:

"That the inhabitants of the counties of La Pointe and Douglass have nearly unanimously signed a petition showing to your memorialists, that the Chippewa Indians in the region of Lake Superior are a peaceable, quiet, and inoffensive people, rapidly improving in the arts and sciences; that they acquire their living by hunting, fishing, manufacturing maple sugar,

and agricultural pursuits; that many of them have intermarried with the white inhabitants, and are becoming generally anxious to become educated and adopt the habits of the 'white man.'

"Your memorialists would therefore pray His Excellency, the President of the United States, to rescind the orders heretofore given for the removal of said Indians, and that such orders may be given in the premises, as shall secure the payment to said Indians, of their annuities at La Pointe, in La Pointe county on Lake Superior, that being the most feasible point therefor.

"And you memorialists also pray that the Senate and House of Representatives in Congress assembled will pass such laws as may be requisite to carry into effect such design and orders; and to encourage the permanent settlement of those Indians as shall adopt the habits of the citizens of the United States.

"And you memorialists firmly believing that justice and humanity require that such action should be had in the premises, will ever pray, etc.

"Approved, February 27, 1854."

In a letter dated August 11, 1854, the Indian Affairs Commissioner directed

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Agent Gilbert to attempt to reach a treaty with the Chippewa to extinguish their title to lands in Minnesota and Wisconsin. The letter authorized Gilbert to reserve 748,000 acres for the permanent homes of the Indians in

areas which did not include mineral lands and were out of the path of white settlement.

Armstrong wrote that when the Indians were notified that the government wished to make another treaty with them at the time of the 1854 annuity payments, the Indians met and discussed what they would require as the price of ceding their western lands to the government. They decided, Armstrong said, "that no one would sign a treaty that did not give them reservations at different points of the country that would suit their convenience, that should afterwards be considered their bona fide home."

Armstrong's statement is corroborated by the report of Commissioner Gilbert, dated October 17, 1854, in which he stated:

We found that the points most strenuously insisted upon by them were first the privilege of remaining in the country where they reside and next the appropriation of land for their future homes. Without yielding these points it was idle for us to talk about a treaty. We therefore agreed to the selection of lands for them in territory heretofore ceded.

During the treaty negotiations, Armstrong reported that Chief Buffalo requested that Armstrong be the interpreter, expressing an opinion that interpreters at other treaty negotiations had made mistakes. Armstrong recorded Chief Buffalo saying, in part:

We do not want to be deceived any more as we have in the past. We now understand that we are selling our lands as well as the timber and that the whole, with the exception of what we shall reserve, goes to the great father forever. *Early Life Among the Indians, supra* at 38.

The Treaty of LaPointe, concluded September 30,

1854, provided that the Chippewa ceded to the United States described land west of Lake Superior. In Article 2, the United States agreed "to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land . . ." A specific area is then described by boundaries for the LaPointe, L'Anse and Viux De Sert Bands. The area reserved for the LaPointe band is the present Bad River reservation. For the other Wisconsin bands, a tract of land "lying about Lac De Flambeau" and a tract "on Lac Court Oreilles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President," were promised. Article 3 of the treaty reserved Presidential discretion to exchange the lands if the reservations were on mineral lands and to make changes in the boundaries of the tracts as "necessary to prevent interference with any vested rights." Other articles of the treaty set forth terms of annuity payments, provisions for half-breeds and traders, and a prohibition on spiritous liquors.⁷

On October 17, 1854, Agent Gilbert reported to the Indian Affairs Commissioner that he had concluded a treaty with the Chippewa at LaPointe on September 30. He reported:

We found that the points most strenuously insisted upon by them were first the privilege of remaining in the country where they reside and next the appropriation of land for their future homes. Without yielding these points it was idle for us to talk about a treaty. We therefore agreed to the selection of lands for them in the territory ceded.

He described the Bad River reservation as the major

⁷Maps showing the territory ceded are at Appendix A; the full text of the treaty is at Appendix B. See also 10 U.S. Statutes at Large 1109.

Wisconsin reserve, saying it was on land "well adapted for agricultural purposes," except for about one-third of the area "lying on the Lake Shore [which] is swamp and valueless, except as it gives them access to the Lake for fishing purposes." He estimated the total reservation acreage under the treaty at 486,000 acres.

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The valueless swampland Gilbert referred to is described differently by an historian who studied the 1854 treaty: "Known as the Kakagan Sloughs, it consisted of twelve square miles of wild rice fields alive with fish and nesting waterfowl." E.J. Danziger Jr. "They Would Not be Moved," *Minnesota History* 179 (Spring, 1973).

In a letter to the Office of Indian Affairs dated November 10, 1854, Gilbert attempted to estimate the area of the land ceded by the 1854 treaty. He described the western boundary as nearly a straight line about 155 miles in length, the northern boundary as about 135 miles long, and the eastern boundary as nearly connecting the northern and western boundaries, "thus giving us a tract of country nearly triangular." A small portion of the territory was not included in the triangle, he added, and he estimated the total area at 7,160,000 acres.

Armstrong reported in his book that Agent Gilbert discussed the 1854 treaty with the Indians again during the 1855 annuity payments assembly. At that time Gilbert assured them that no white man could live on the reservations or go upon them to take timber, minerals, or anything else, without the permission of the Indians.

Although the government continued to encourage the Indians to devote their efforts to agriculture, many continued to roam beyond reservation boundaries throughout the ceded area, hunting, fishing and gathering wild rice. The 1869 Report of the Commissioner of Indian

Affairs noted that the Chippewa were living on their reservations only in the winter, and Danziger found that it was not until 1892 that the Commissioner of Indian Affairs could "state assuredly that a majority of the Chippewa of Lake Superior were permanent reservation residents." E. J. Danziger, *supra* at 182.

A survey of the land in the vicinity of Lac Courte Oreilles was made for the United States government in 1855, and accepted by the Surveyor General on February 20, 1856.

In 1859, a special agent was appointed by the Office of Indian Affairs to confer with the Lac Courte Oreilles chiefs to select a tract "equal in extent to three townships" guaranteed them by the 1854 treaty. The letter of instruction stated that the band would be found in the vicinity of the Menomonee and Red Cedar Rivers where they had sojourned from "the reservation provided for them at Lac Courte Oreille," and that the selection should be made from nine townships which had been reserved from sale and settlement for that purpose.

A list of selected lands prepared by the agent was transmitted from the Department of Interior to the General Land Office on October 20, 1859; and the Commissioner of the Land Office subsequently directed an Eau Claire Agency to enter the selections upon the land office books and plats. The selected lands included all of Townships 39 and 40, Range 8; Township 39, Range 7, except sections 22-27 and 34-36; sections 4-9 and 16-18 of Township 38, Range 8; and detached tracts in Township 40, Range 6 and 7.

In the document setting forth the selections, the Lac Courte Oreilles headmen agreed "to use all our authority and influence to induce our people to abandon the lands sold or ceded to the United States by us and our fathers, and to rest with us upon the lands selected by us and described within our reservation and homes."

That selection proved to be unsatisfactory, however, as indicated by a letter to the Secretary of the Interior on February 6, 1865. The writer, Indian Commissioner W. P. Dole, stated that it was difficult for the Indians to define the limits of their reservation because of a number of detached tracts of land. Dole recommended that lands adjacent to the compact portion of the reservation be withdrawn from sale in order to allow the Indians to select lands from that area in compensation for relinquishing the detached tracts of land. The order to withhold the lands from market followed on April 4, 1865.

Trouble with uncertain reservation boundaries continued in 1868. Indian Agent Asaph Whittlesey reported to the Commissioner of Indian Affairs that because of disagreements about the location

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of boundary lines, the Chiefs of the Lac Courte Oreilles were involved in disputes about whether white men were trespassing on the reservation.

On December 18, 1872, Indian Agent Clark was instructed by the Commissioner of Indian Affairs to adjust the Lac Courte Oreilles reservation selections to make the reservation as compact as possible. He was specifically instructed "to omit Section 16 of each township from the original reserve as well as from the additional list of February 6, 1865. These sections are claimed by the State as school lands and it [is] thought best to avoid controversy in regard to them."

On February 17, 1873, Agent Clark presented the list of selected lands to the Acting Commissioner of Indian Affairs. The list was subsequently submitted by the Commissioner to the Secretary of the Interior, who approved it on March 1, 1873. The list indicates that a total of 69,136.41 acres were withdrawn for the reserva-

tion. It also indicates that no sections 16 were selected for the reservation.

There are 23,040 acres in a township; 69,120 acres in three townships.

On February 4, 1873, the Secretary of Interior wrote in a letter (addressee unknown) that he was of the opinion that sections 16 in the Lac Courte Oreilles reservation belonged to the State.

The Lac Courte Oreilles Tract Book kept at the Great Lakes Indian Agency has an "Allotment Roll" of land owned by individual members of the tribe. None of the lands listed there as belonging to individual tribe members is in a section 16. A number of maps of the reservation made by federal government agencies exclude sections 16 from the reservation lands.

The State of Wisconsin issued a patent to Section 16 in Township 39 North, Range 8 West to C.C. Putnam on June 7, 1875. On November 11, 1882, it issued a patent to C.C. Putnam for part of the lands in Section 16 in Township 39 North, Range 7 West. A patent to part of Section 16, Township 39 North, Range 7 West was issued by the state to A. B. McDonnell on August 24, 1883. George B. Burrows received a patent to part of Section 16 in Township 39 North, Range 7 West on January 23, 1885. A patent to part of Section 16, Township 39 North, Range 7 West was given on March 6, 1885, to a private person whose name I cannot read. Herman Greve received a patent to part of Section 16, Township 39 North, Range 7 West on December 11, 1884.

On June 21, 1937, the United States purchased land in Section 16, Township 40 North, Range 8 West from Johanna and Karl Treziok; the warranty deed was filed on June 28, 1937, in Sawyer County. On December 17, 1936, the United States purchased land from the Chippewa Valley Construction Co. Land in Section 16,

Township 39 North, Range 7 West was included in the purchase. And on January 8, 1936, the United States bought land in Section 16, Township 40 North, Range 8 West from J. T. and Harriette Woon.

With respect to certain parts of Section 16 in Township 40 North, Range 8 West, and certain parts of Section 16 in Township 39 North, Range 7 West, the record does not disclose whether the state has issued patents or has retained its asserted title.

The Bad River and Lac Courte Oreilles Bands are part of the Lake Superior Tribe of Chippewa.

United States v. Bouchard, 76—CR—70

This is a criminal proceeding pursuant to 18 U.S.C. § 1165. In the amended information, the United States charges that defendant, without lawful authority and permission, willfully and knowingly went upon land known as the Kagagon Slough, a navigable waterway within the boundaries of the Bad River Indian Reservation, for the purpose of fishing, in violation of 18 U.S.C. § 1165. The amended information charges that by virtue of treaties between the United States and the Lake Superior Tribe of the Chippewa Indians signed in 1842 and 1854, the Kagagon Slough is land belonging to an Indian tribe, held in trust by the United States. Section 1165 states:

§ 1165. HUNTING, TRAPPING, OR
FISHING ON INDIAN LAND

Whoever, without lawful authority or permission, willfully and knowingly goes

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upon any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or are subject to a restriction against alienation imposed by the

United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon, or for the removal of game, peltries, or fish therefrom, shall be fined not more than \$200 or imprisoned not more than ninety days, or both, and all game, fish, and peltries in his possession shall be forfeited.

Thus, the amended information rests upon that part of § 1165 which reads as follows: "Whoever, without lawful authority or permission, willfully and knowingly goes upon any land that belongs to any . . . Indian tribe . . . and . . . [is] held by the United States in trust . . . , for the purpose of . . . fishing thereon"

Defendant has moved to dismiss the amended information, citing four reasons: (1) water is not "land" within the meaning of the statute; (2) the slough does not belong to an Indian tribe and is not held in trust by the United States; (3) The Indians do not have an exclusive right to fish in the slough; and (4) § 1165 is unconstitutional and void because the right to regulate fishing is a power reserved to the state by the Tenth Amendment to the Constitution. Because I hold, below, that the amended information must be dismissed on the ground that the slough does not belong to an Indian tribe and is not held in trust by the United States, I will not consider contentions three and four.

Defendant's first contention is that the amended information alleges that defendant was in a boat on a waterway, and that a waterway is not "land" as defined in § 1165. Pointing out that penal statutes should be strictly construed, defendant urges "a common sense interpretation" of the word "land."

[2] I conclude that when "land" is used in the context of § 1165, common sense indicates that it refers to broad areas of earth and water. Congressional intent

reflected by the language of the Act is to prevent trespass upon Indian lands for the purposes of fishing, hunting or trapping. Fishing can only be done in water, of course; a person fishing from a boat is trespassing in the same sense as a person fishing from the shore.

This common sense interpretation of "land" is corroborated by the technical definition of land in *Black's Law Dictionary*, 1019 (4th Ed., 1951), which includes all things of a permanent and substantial nature such as water. See also *United States v. Pollman*, 364 F.Supp. 995 (D.Mont.1973), in which the court held that the term "land" in § 1165 clearly and unambiguously includes waterways.

The remainder of this opinion is directed to defendant's second contention, namely, that the bed of the navigable waterway upon which defendant was allegedly fishing became the State's property upon its admission to statehood in 1848 and remains the State's property today, and thus is not "land that belongs to any . . . Indian Tribe" and "held by the United States in trust."

The defendant contends that the treaty of 1842 resulted in the United States' ownership of the navigable waterway at issue; that the United States held that waterway in trust for the future State; that when the territory of Wisconsin became a State in 1848 title to the waterway became vested in the State as trustee for the public; and that any purported grant of navigable waterways to the Chippewa in 1854 by the United States was without authority and a nullity. Plaintiff responds with two contentions: first, that the Chippewa retained beneficial ownership of the land ceded to the United States by the treaty of 1842 and thus the State did not take title to the waterway at issue upon statehood; second, that even if the State did acquire title to the waterway at issue, the United States had sufficient treaty authority to grant exclusive use of the waterway to

the Chippewa in 1854.

Wisconsin entered the Union "on an equal footing with the original States," and

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the original States possessed "... the absolute right to all their navigable waters and the soils under them, for their own common use, subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell*, 41 U.S. (16 Ped.) 366, at 410, 10 L.Ed. 997 (1842).

[3] Assuming that the Chippewa ceded all their rights in the navigable waterways within the boundaries of the ceded area to the United States by the 1842 treaty, it is well settled that the government's title to the beds of navigable waterways was held in trust for the future State, and upon statehood passed to Wisconsin in trust for the public. *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9 (1935); *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913); *Shively v. Bowlby*, 152 U.S. 1 at 49, 14 S.Ct. 548, 38 L.Ed. 331 (1894).

This principle was explained in *United States v. Holt State Bank*, 270 U.S. 49, 46 S.Ct. 197, 70 L.Ed. 465 (1926). The United States had brought suit to clear title to the bed of a lake which had been a navigable body of water in an Indian reservation. After the reservation was terminated and the lands around the lake sold to various settlers, the lake was drained. The issue was whether the bed of the lake belonged to the state or the federal government. The court held (270 U.S. at 54-55, 46 S.Ct. at 198-199):

It is settled law in this country that lands underlying navigable waters within a state belong to the state in its sovereign capacity . . . subject to the qualification that where the United States, after acquiring a territory and before the

creation of the state, has granted rights in such lands . . . such rights are not cut off by the subsequent creation of the state, but remain unimpaired, and the rights which otherwise would pass to the state in virtue of its admission into the Union are restricted or qualified accordingly. . . .

The state of Minnesota was admitted to the Union in 1858 . . . and under the constitutional principle of equality among the several states, the title to the bed of Mud Lake then passed to the state, if the lake was navigable, and if the bed had not already been disposed of by the United States.

[4] The "disposal" of a navigable waterway which prevents a state from obtaining fee simple title to the water and the land beneath it may either be a transfer of legal ownership, such as the fee simple title given to the Indians in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970), or a transfer of beneficial ownership. In *United States v. Finch*, 548 F.2d 822, at 827 (9th Cir. 1976), for example, the court held:

The United States either transferred beneficial ownership of the bed to the Crow Tribe by the treaties of 1851 and 1868 or retained ownership of the bed as public lands, which passed to the State of Montana upon its admission to the Union.

[5] To determine whether beneficial ownership of the lands has been transferred, the *Finch* court examined the treaties to determine whether they had reserved the riverbed for the exclusive use of the tribe. A similar inquiry into the exclusivity of the Indians' use was made in *Montana Power Co. v. Rochester*, 127 F.2d 189 (9th Cir. 1942), and *United States v. Pollman*, 364 F.Supp. 995 (D.Mont.1973). The propriety of this inquiry is indicated

by the Supreme Court's analysis of the relevant treaty in *Holt, supra*. In determining that the treaty did not constitute a disposal of the waterbed to the Indians, the court placed considerable reliance upon the fact that there was no attempted exclusion of non-Indians from the navigable waters, but that the Indians' right was held only in common with the right of white settlers to use the waters. Additionally, an inquiry into exclusivity of use is consistent with the general principle that the federal government cannot hold the same property simultaneously in trust for two conflicting purposes. See also *Bennett County, South Dakota v. United States*, 394 F.2d 8 (8th Cir. 1968), in which land set aside for exclusive use of the Indian tribe was held not to be "public land" upon which the state could build a highway.

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Accordingly, I must examine the 1842 treaty to determine whether the Chippewa reserved for themselves exclusive use of the navigable waterways in the ceded area.

There is no specific statement in the 1842 treaty about the Indians' rights in or to the navigable waterways which were within the boundaries of the subject area of the treaty. Based upon language in *Holt State Bank*, defendant argues that in the absence of a clear indication that the title to the waters was placed in the Indians, such an inference should not be made. In *Holt*, the court stated that "disposals [of navigable waters] by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain." 270 U.S. at 55, 46 S.Ct at 199.

However, the *Holt* standard is drawn from *Shively, supra*, a case involving a grant of property rights to a private person, and the standard is incompatible with

long established and well recognized rules of construction for Indian treaties. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832), a rule of liberal construction in favor of the Indians was established with this comment (31 U.S. at 582):

The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. . . . How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

And in *Choctaw Nation v. United States*, 119 U.S. 1, at 28, 7 S.Ct. 75, 90, 30 L.Ed. 306 (1886), the court said:

The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right, without regard to technical rules framed under a system of municipal jurisprudence, formulating the rights and obligations of private persons, equally subject to the same laws.

That standard has been applied consistently in construing Indian treaties,⁸ and has recently been reiterated in *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970). *Choctaw Nation* also involved the federal government's disposition of title to riverbeds of navigable waterways in a territory of the United States. The Court held (397 U.S. at 630-631, 90 S.Ct. at 1334):

... these treaties are not to be considered as exercises in ordinary conveyancing. The Indian Nations did not seek out the United States and agree upon an exchange of lands in an arm's-length transaction. Rather, treaties were imposed upon them and they had no choice but to consent. As a consequence, this Court has often held that treaties with the Indians must be interpreted as they would have understood them [citations omitted], and any doubtful expressions in them should be resolved in the

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Indians' favor . . . [citations omitted].

Specifically addressing the argument that a grant of the riverbeds could not be inferred because the treaty "did not pause specifically to provide for the ownership of the riverbed," the court minimized the import of the treaty construction rule suggested by the court in *Holt* (397 U.S. at 634, 90 S.Ct. at 1336):

⁸See *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Squire v. Capoeman*, 351 U.S. 1, 76 S.Ct. 611, 100 L.Ed. 833 (1956); *Winters v. United States*, 207 U.S. 564, 28 S.Ct. 207, 52 L.Ed. 340 (1908); *United States v. Winans*, 198 U.S. 371, 25 S.Ct. 662, 49 L.Ed. 1089 (1905); *United States v. Pollmann*, 364 F.Supp. 995 (D.Mont. 1973); *State v. Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1971).

However, nothing in the *Holt State Bank* case or in the policy underlying its rule of construction (see *Shivley v. Bowlby*, *supra* [152 U.S.] at 49-50 [14 S.Ct. 548]) requires that courts blind themselves to the circumstances of the grant in determining the intent of the grantor. Indeed, the court in *Holt State Bank* itself examined the circumstances in detail and concluded "the reservation was not intended to effect such a disposal." 270 U.S. at 58, [48 S.Ct. 197]. We think that the similar conclusion of the Court of Appeals in this case was in error, given the circumstances of the treaty grants and the countervailing rule of construction that well-founded doubt should be resolved in [the Indians'] favor.

[6] In the present case, there is some evidence indicating that the Indians did not understand they were ceding their land by the 1842 treaty. Armstrong reported that the Indians thought they were selling only the pine timber and minerals, and Chief Hole-in-the-day wrote that he understood the whites wanted only the copper in the land.

Yet the language of cession is clear and unqualified. Even construing that language liberally in favor of the Indians, I cannot construe it as not meaning what it clearly says. See *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425 at 447, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975). Additionally, although the Indians probably did not understand the concept of legal title, the evidence shows that they did know they were giving up significant rights in the land. They knew that their occupation of certain parts of the territory would be ended to make way for mining and logging operations, that they would have to accommodate white settlers, and that they could be removed completely if they misbehaved. Additionally, the language of the Chippewa's

1849 petition to Congress asking for a "grant" of lands for Indian villages shows their understanding that they did not have a legal right to those lands. Thus, I find that the Chippewa did convey to the United States their so-called "aboriginal title," discussed below, to the lands described in the 1842 treaty.

The more difficult issue is whether the Indians' stipulation "for the right[s] of hunting . . . with the other usual privileges of occupancy" was intended as a reservation of exclusive hunting and fishing rights in the ceded lands.

All of the cases of which I am aware in which Indians were found to have been given an exclusive right to hunt or fish in certain areas involved treaties establishing reservations for the Indians' permanent homes. In some cases, exclusive use or affirmative exclusion of "unauthorized persons" was explicit. *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976); *United States v. Pollmann*, 364 F.Supp. 995 (D.Mont.1973); *Moore v. United States*, 62 F.Supp. 660 (W.D.Wash.1945). *aff'd* 157 F.2d 760, *cert. denied* 330 U.S. 827, 67 S.Ct. 867, 91 L.Ed. 1277. In *Choctaw Nation, supra*, the reservation lands were given in fee simple. In other cases, the courts noted that the Indians were being confined to reservation lands as their permanent homes; that the reservation lands were only a portion of the Indians' previous holdings; and that if the Indians were to be able to support themselves by their traditional means of sustenance without depleting their food supply, they would need exclusive rights to hunt and fish on the reservation lands. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918); *United States v. White*, 508 F.2d 453 (8th Cir. 1974); see also *Menominee Tribe v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

[7] In the present case, the Indians were not confined by the terms of the 1842 trea-

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ty to an area smaller than the one they occupied at the time of the treaty; they reasonably would have expected that the miners, loggers and soldiers who were settling in the territory would hunt and fish for their food; and with the abundance of fish and game in northern Wisconsin, it is unlikely that either the Indians or the government would have anticipated that it would be necessary for the Indians to have exclusive fishing and hunting rights in order to maintain themselves in their vast territory. I conclude that the right of hunting and "other usual privileges of occupancy" which the Indians reserved in the treaty of 1842 were rights held in common with white persons in the area. Thus, the bed and waters of the Kagagon Slough were not reserved exclusively for the Chippewa by the 1842 treaty, and title to the bed of that navigable waterway passed to Wisconsin upon admission as a state in 1848.

[8-13] Defendant argues further that since the State of Wisconsin acquired title to the Kagagon Slough in 1848, any purported grant of rights in that waterway to the Chippewa by the 1854 treaty was "subject to the prior and paramount rights of ownership and/or the power to regulate the navigable waters which the State of Wisconsin acquired. . . ." Plaintiff responds that the federal government had the treaty power in 1854 to grant the Chippewa the right to exclusive use of the navigable waterways in their reservation. While it is likely that the federal government did have the treaty authority to grant the Chippewa exclusive use of the waterways,⁹ it

⁹It is well established that the Constitutional provision granting Congress the authority "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes," Article I,

appears that the particular language of § 1165 upon which the amended information rests requires that title to the land upon which the alleged trespass was committed be vested in the United States. Section 1165 provides for several possible combinations of ownership of Indian land. The amended information in this case alleges one of them: "land that belongs to any Indian tribe . . . held by the United States in trust." The phrase "belongs to any Indian tribe" suggests that the Indians should hold legal title; but the phrase "held by the United States in trust" suggests that the United States should hold legal title, with beneficial ownership by the Indians. While the statute is inartfully drawn, I construe it as requiring, as an element of the offense, that the United States hold legal title to the land at issue in trust for the Indians.

Section 8, clause 3, gives the federal government an authority, superior to the state's sovereign authority, to regulate navigable waters. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, at 334, 78 S.Ct. 1209, 2 L.Ed.2d 1345 (1958); *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143 (1946). Additionally, the Commerce Clause and the "recognized relation of tribal Indians to the Federal government" confer upon the federal government the authority to make regulations "reasonably essential" to the protection of the Indians. *Morton v. Mancari*, 417 U.S. 535 at 551-552, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974); *Perrin v. United States*, 232 U.S. 478 at 482, 34 S.Ct. 387, 389, 58 L.Ed. 691 (1914). Thus, the federal government clearly had power in 1854 to impose protective regulations upon the navigable waterway at issue. A treaty provision granting exclusive use of a waterway to Indians and excluding non-Indians may reasonably be viewed as a regulation within the Congressional power.

An alternative way to define a grant of exclusive use of a navigable waterway is as an appropriation of the waters for the use of the Indians. It is clear that the federal government has the power to make such an appropriation. *Cappaert v. United States*, 426 U.S. 128, at 138, 96 S.Ct. 2062, 48 L.Ed.2d 523 (1976); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963). See also Cohen, *Handbook of Federal Indian Law* at 318 (1971).

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The interpretation of § 1165 as requiring that legal title be in the United States is supported by the fact that § 1165 is part of a chapter of statutes which begins with a relatively broad definition of "Indian country." This definition applies to all but two sections of the chapter. This definition of "Indian country" does not include title as one of the required elements. Yet when Congress enacted § 1165, it chose to include a narrower definition of Indian land in the section, in language indicative of a requirement of title in the United States.

This interpretation of the language of § 1165 is supported by *United States v. Finch*, 548 F.2d 822 (9th Cir. 1976) and *United States v. Pollmann*, 364 F.Supp. 995 (D.Mont.1973), both cases in which defendants prosecuted under § 1165 maintained that their alleged offenses had not taken place on Indian land, as defined by § 1165. In *Finch*, the court held that its decision about the applicability of § 1165 was controlled by two Supreme Court cases involving the title to lands underlying navigable waters. *Supra* at 827. Similarly, in *Pollmann*, the court began its analysis of the case by determining the ownership of the lake in which defendant had fished, and concluded that the United States held title to the lake in trust for the Indians.

Any national government action reserving a public area for the exclusive use of Indians at first may appear to be racial discrimination in violation of the equal protection guarantee implicit in the due process clause of the Fifth Amendment. The unique legal status of tribal Indians and the federal government's duty to protect them, however, is such that special treatment for them does not violate equal protection or due process guarantees "as long as special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, ..." *Morton, supra*, 471 U.S. at 555, 94 S.Ct. at 2485; *Moe v. Salish and Kootenai Tribes*, 425 U.S. 463, at 479-480, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976).

Because title to the navigable waterways within the reservation had passed to the state in 1848, and because that portion of § 1165 pertinent to the present case requires that title be in the United States, this prosecution must fail unless the United States regained title from the State some time after 1848. The only conceivable time and manner of such reacquisition is the 1854 exercise of the treaty power of the national government. Therefore the issue is whether the United States enjoyed the treaty power actually to retake title from Wisconsin and, if so, whether it chose to exercise that power by entering into the 1854 treaty.

The federal government's treaty power: . . . as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself, and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that on one of the States, or a cession of any portion of the territory of the latter, without its consent.

Geofroy v. Riggs, 133 U.S. 258 at 267, 10 S.Ct. 295, 297, 33 L.Ed. 642 (1890). See also *Reid v. Covert*, 354 U.S. 1, 77 S.Ct. 1222, 1 L.Ed.2d 1148 (1957).

[14-16] As an incident of national sovereignty, the federal government enjoys the power of eminent domain to take private property for public purposes without the State's consent. *Kohl, et al. v. United States*, 91 U.S. 367, 23 L.Ed. 449 (1875). The power of eminent domain extends to the taking of state-owned property without its consent. *Oklahoma ex rel Phillips, Governor v. Guy F. Atkinson Co.*, 313 U.S. 508, 61 S.Ct. 1050, 85 L.Ed. 1487 (1941). Additionally, the United States may take property

"either by entering into physical possession of the property without a court order, or by instituting condemnation proceedings under various Acts of Congress." *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 83 S.Ct. 379, 9 L.Ed.2d 350 (1963); *United States v. Dow*, 357 U.S. 17, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958).

[17] However, in exercising the power of eminent domain, the government is limited by the provisions of the Constitution, including the Fifth Amendment prohibition of taking private property without just compensation. Thus, whenever eminent domain is exercised through physical seizure of property, title to the property does not pass to the government until the owner of the property receives compensation for the taking. *Dow*, *supra* at 21, 83 S.Ct. 379; *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581, 587, 43 S.Ct. 442, 67 L.Ed. 809 (1923). This requirement of compensation before title may pass is as applicable when state-owned lands are taken as when private citizens' lands are taken.

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United States v. Carmack, 329 U.S. 230 at 242, 67 S.Ct. 252, 91 L.Ed. 209 (1946).¹⁰

[18] Since there is no indication that the government compensated the State for any purported taking of its lands by the 1854 treaty, the United States did not

¹⁰In *Carmack* the Court noted an exception to the rule of just compensation, saying that "when the Federal Government takes property from state ownership merely so as to put it to a federal public use for which the state already holds it in trust, a like obligation does not arise to pay just compensation for it." That exception is not applicable to the present case, however, since the state held the waterway in trust for the common use of all people, while the federal government alleges in this case that the federal public use was to reserve the water for the exclusive use of the Indians. The two public purposes conflict.

acquire title to the bed of the Kagagon Slough through its legitimate powers of eminent domain. If I were to interpret the 1854 treaty as a taking of the title to the State's property without compensation, that treaty would be in violation of the United States Constitution, and therefore unauthorized and void. I decline so to construe the treaty.

Plaintiff has cited a number of decisions in support of its contention that the United States enjoyed the treaty power in 1854 to grant the Chippewa exclusive use of the navigable waterways in their reservation. Although, as I have pointed out, because of the particular language of § 1165, the issue in this case is the government's authority to take and convey title to the waterway rather than its authority to grant exclusive use to the Chippewa, a brief discussion of the decisions cited by plaintiff may be useful.

In *United States v. Thomas*, 151 U.S. 577, 14 S.Ct. 426, 38 L.Ed. 276 (1894), a defendant in a criminal prosecution challenged the jurisdiction of the federal court, asserting that the part of the Lac Courte Oreilles reservation on which the alleged offense had taken place was within what would have been the sixteenth section of a Wisconsin township. The federal government had pledged in Wisconsin's Enabling Act to donate the sixteenth section of each township to the new state for school purposes. Like the Bad River reservation in the present case, the Lac Courte Oreilles reservation was created after statehood. Thus, the defendant argued that the federal government lacked authority in 1854 to create a reservation on the sixteenth section of a township.

The *Thomas* court held that by the treaty of 1842, the Indians were granted a right of temporary occupancy on the land in question which had not been revoked.¹¹

¹¹ A Presidential removal order of 1850 has an important bearing on whether the Indians' right of temporary occupancy had been revoked. This removal order and its legal effect are discussed fully in the opinion in *United States v. Ben Ruby*, *infra*. When it decided

Whatever interest the State had acquired in the sixteenth section was subject to the Indians' prior right of occupancy, the court held, and thus the federal government had the authority to create a reservation on that land (151 U.S. 583, 14 S.Ct. 428):

Whatever right the State of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy for which the Indians stipulated and which the United States recognized. The general rule established by the land department in reference to the school lands in the different states is that the title to them vests in the several states in which the land is situated, subject to any prior right of occupation by the Indians or others which the government had stipulated to recognize.

The statute dealt with in *Thomas* (section 9 of the Act of Congress of March 3, 1885, c. 341, 23 Stat. 362, 385) conferred jurisdiction upon the federal courts in cases in which an Indian was charged with murdering another person "within the boundaries of any State of the United States, and within the limits of any Indian reservation." Thus, it was not necessary to determine whether the United States or the Indians, on the one hand, or the State, on the other, held actual title to the land in a section 16 in which the offense allegedly occurred. As the passage

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from *Thomas* quoted above reflects ("whatever right the State of Wisconsin acquired . . ."), *Thomas* is ambiguous at best on the question where title to a section 16 resided,

Thomas, the Supreme Court of the United States was unaware of the existence of the President's 1850 removal order. See 151 U.S. at 582, 584, 14 S.Ct. 426.

even assuming that the section 16 was included within an Indian reservation.¹²

In *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968), the issue was whether on certain lands the Indians were governed by state hunting and fishing laws. The Court noted that the Menominees had ceded their Wisconsin lands to the United States in 1848, a few months after statehood, and had agreed to remove to their lands in Minnesota. The removal effort did not succeed, and in 1854 the Menominees acquired a reservation from the United States in Wisconsin by the Treaty of Wolf River. The State argued that between 1848 and 1854, Wisconsin had acquired jurisdiction over the ceded lands; thus, the Menominees had lost their special hunting and fishing rights on those lands and did not regain them with the creation of the reservation in 1854. The Court noted (391 U.S. at 412-413, n. 12, 88 S.Ct. at 1710):

If any hiatus in title to the reservation lands in question occurred between 1848 and 1854, any jurisdiction that the State may have acquired over those would not have survived the Treaty of 1854. The Treaty of Wolf River was, under Article VI of the Constitution, the "supreme law of the land," and the exercise of rights on reservation lands guaranteed to the tribe by the Federal Government would not be subject to state regulation, at least in absence of a cession by Congress. . . . In this connection it should be noted that in 1853 the Wisconsin Legislature

¹²See a more extended discussion of *Thomas* in my opinion in *United States v. Ben Ruby, et al.*, *infra*. Essentially the same claim was raised in *Wisconsin v. Hitchcock*, 201 U.S. 202, 26 S.Ct. 498, 50 L.Ed. 727 (1906), with regard to lands within the Bad River Reservation. The court dealt with the case summarily, relying upon the reasoning of *Thomas*.

consented to the establishment of the Menominee Reservation subsequently confirmed by the 1854 Treaty (1853 Wis.Jt. Res., c. I), an action which can be fairly construed as a disclaimer of any jurisdiction the State may have possessed.

[19] Plaintiff argues first that the 1854 Treaty of LaPointe with the Chippewa, like the Treaty of Wolf River with the Menominee, became the supreme law of the land and superseded any state regulation of navigable waterways in the reservation areas. It is axiomatic, however, that a treaty may only become the supreme law of the land if it is a valid treaty. As explained above, a treaty must be constitutional. If the 1854 Treaty of LaPointe is construed as divesting the State of title to the navigable waterways in the Bad River reservation without compensation, it is invalid and void in that respect. The same problem of constitutionality is not raised in the *Menominee* case with respect to the Treaty of Wolf River; it was not contended that the Treaty of Wolf River affected title but only that it affected hunting and fishing regulations by the state.

[20] Secondly, plaintiff contends that the 1854 Memorial of the Wisconsin Legislature, asking that Congress encourage the permanent settlement of the Lake Superior Chippewa in the State, should be construed as a disclaimer of state jurisdiction, as the 1853 Joint Resolution was construed in the *Menominee* case. A memorial observing in tones of approval, as does the 1854 memorial, that the Indians are intermarrying with whites and are anxious to adopt the habits of whites, and asking Congress "to encourage the permanent settlement of those Indians as shall adopt the habits of the citizens of the United States," cannot be construed to reflect a desire to clear the way for exclusive use of navigable waters by an Indian tribe by disclaiming the State's title. In any event, in *Menominee* the Supreme Court construed the 1853 memorial as a disclaimer of state jurisdiction,

presumably jurisdiction to regulate hunting and fishing; the Court was not called upon to construe the memorial as a relinquishment of title to the lands in question, and did not so construe it.

A similar issue was reached in *State v. Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1971). The State claimed the right to reg-

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ulate the fishing activities of the Chippewa in areas of Lake Superior adjacent to two of their reservations. The court rejected the State's argument that because the lake was within the State's jurisdiction in 1854, the federal government lacked the treaty authority to give the Chippewa special fishing rights in Lake Superior in that year. Instead, the court held that Congress was empowered to convey fishing rights, that it did so in the treaty of 1854, and that the treaty superseded and limited the State's Enabling Act, which had given the state jurisdiction over fishing in Lake Superior. Again, of course, it was fishing rights rather than title to the waterways which were at stake, and *Gurnoe* does not reach the present issue.

The government's citations to *Kleppe v. New Mexico*, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976) and *United States v. Brown*, 552 F.2d 817 (8th Cir. 1977), *cert. denied*, 431 U.S. 949, 97 S.Ct. 2666, 53 L.Ed.2d 266, fail on the same distinction; they involved regulation of federally-owned property rather than federal acquisition of title to state property.¹³

¹³The opinion of the Court in *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963) includes language which could be construed in support of plaintiff's position in this case. The issue in *Arizona* was proper allocation of the water in the Colorado River for irrigation, drinking, and other purposes. Arizona challenged the validity of a master's allocation of some of the water to an Indian

If § 1165 were civil rather than criminal, it might be possible to construe it liberally and consistently with its purpose so as to require only that the land be reserved for the exclusive use of the Indians, regardless of the locus of legal title. But § 1165 is criminal. Since the title to the Kagagon Slough vested in the State of Wisconsin upon its admission to statehood in 1848, and since the United States did not have the treaty power to divest the State of that title without reimbursement, title to the Slough remains in the State. Thus, the Kagagon Slough does not belong to any Indian tribe nor is it held in trust by the United States. It is true that the amended information alleges that the Kagagon Slough does so belong and is so held. However, it goes on to articulate the basis for those allegations, namely the treaties of 1842 and 1854, thus making it vulnerable to a motion to dismiss for failure to allege an offense within the meaning of § 1165.

reservation in Arizona. The Court held at 597-598, 83 S.Ct. at 1496:

Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in *Pollard's Lessee v. Hagan*, 3 How. 212 [11 L.Ed. 565] (1845) and *Shively v. Bowlby*, 152 U.S. 1, [14 S.Ct. 548, 38 L.Ed. 331] (1894). Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory required by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.

From the statement limiting *Pollard's Lessee* and *Shively* as relevant only to title to the shores and beds of navigable waters, it might be inferred that title to navigable waters is not held by the state. *But see*

Accordingly, defendant's motion to dismiss the amended indictment must be granted. An order granting it appears at the foot of this entire opinion.

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United States v. Ben Ruby, et al., 72-C-366

This is a civil action instituted by the United States to clear title to certain lands in Wisconsin. Jurisdiction is present. 28 U.S.C. § 1345. The case is currently before the court on defendants' motions for summary judgment,¹⁴ and plaintiff's cross-motion for summary judgment.

The specific lands at issue are Section 16 in Township 39 North, Range 7 West, Section 16 in Township 39 North, Range 8 West, and Section 16 in Township 40 North, Range 8 West, all in the Fourth Principal Meridian, Sawyer County, Wisconsin. Plaintiff claims that it holds fee simple title to those lands in trust for the Lac Courte Oreilles Band of Lake Superior Chippewa

Port of Seattle v. Oregon & W. R.R., 255 U.S. 56 at 63, 41 S.Ct. 237, 65 L.Ed. 500 (1921); *Donnelly v. United States*, 228 U.S. 243 at 260, 33 S.Ct. 449, 57 L.Ed. 820 (1913). But the context of that statement shows that title was not an issue in *Arizona*; rather the issue was the federal government's power to regulate and use navigable waters for a federal reservation. Thus a holding in this case that the federal government had the authority to grant exclusive use of the Kagagon Slough to the Indians, but did not have the authority to divest the state of its title to that waterway without compensation, is consistent with the *Arizona* decision.

¹⁴Defendant State of Wisconsin and defendant Owens-Illinois Glass Company each has moved for summary judgment. I have previously ordered that every defendant who has appeared in this action would be considered a co-movant with the State and Owens-Illinois in those motions. Because I think it just to protect all defendants who have been served with a summons and complaint regardless of their appearance or non-appearance in the case, I now construe the defendants' motion for summary judgment as being on behalf of every named defendant who has been served.

Indians, pursuant to Treaties of 1837, 1842 and 1854, and executive action establishing the Lac Courte Oreilles reservation in 1873. Defendants are the State of Wisconsin and private parties who claim interests in parts of the sections 16 at issue through patents initially granted by the State. Some of the defendants have not been served with a summons and complaint. Those who have been served claim that by virtue of the August 6, 1846, Act of Congress enabling the territory to form a constitution and state government, and the 1848 Act admitting Wisconsin to the Union, the interests of the United States and the interests of the Indians in the lands at issue were extinguished and title was acquired by the State.

The parties have submitted affidavits and numerous documents to the court. From those submissions and upon the basis of the entire record herein, I find that there is no genuine issue as to the material facts set forth under the heading "Facts" in the opening portion of this consolidated opinion and order in these three cases.

Estoppel

Defendants contend that the United States is estopped by three actions from claiming title to the sections 16 at issue: the Secretary of the Interior recognized the State's title to those lands in 1873; the Commissioner of the General Land Office recognized the State's title to those lands in 1918; and the United States purchased some of those lands in 1936 and 1937.

[21] Defendants recognize an exception to the doctrine of estoppel when in its sovereign capacity the United States attempts to carry out engagements made by it with Indian tribes. *United States v. Brookfield Fisheries*, 24 F.Supp. 712 (D.Or.1938). But defendants contend that the exception does not apply in this case because the United States had no treaty obligation to provide the Chippewa with occupancy of the sections 16

at issue. The existence or non-existence of such a treaty obligation is an issue going to the merits of this case. When the United States asserts the existence of such a treaty obligation, the claim must come within the exception to the estoppel doctrine; to estop the court from reaching the merits of the claims of a treaty obligation would defeat the purpose of the exception. *See also United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, at 360, 62 S.Ct. 248, 86 L.Ed. 260 (1941); *Cramer v. United States*, 261 U.S. 219 at 234, 43 S.Ct. 342, 67 L.Ed. 622 (1923); *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976); and *United States v. Ahtanum Irrigation District*, 236 F.2d 321 at 334 (9th Cir. 1956), where the courts held that the United States cannot be estopped from making a claim as trustee for or on behalf of an Indian tribe. I proceed to the merits.

United States v. Thomas

The United States contends that the specific issue has been decided in its favor by the Supreme Court of the United States in *United States v. Thomas*, 151 U.S. 577, 14 S.Ct. 426, 38 L.Ed. 276 (1894). I must determine whether the specific issue present-

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ed here was indeed decided in *Thomas* and, if so, whether I am bound by that decision.

I conclude that *Thomas* did not hold that title in fee to the disputed sections 16 is in the United States, and that even if such a holding were to be inferred from the language of the opinion, I am not bound by it.

Some time shortly before 1893 an indictment was returned in the federal court in this district against the defendant Thomas, a member of the Chippewa tribe, charging him with murdering a person within the Lac

Courte Oreilles reservation. A verdict of guilty was returned against him. Defendant moved to set aside the verdict on the ground that the federal court lacked jurisdiction. Under the jurisdictional statute involved, Section 9 of the Act of Congress of March 3, 1885, c. 341, 23 Stat. 362, 385, federal jurisdiction depended upon whether the crime had been committed "within the limits of any Indian reservation." Because the evidence at the trial had tended to show that the offense had occurred within a section 16, and because defendant contended that the particular section 16 had been ceded to the State of Wisconsin pursuant to the statehood enabling Act, he asserted that it could not subsequently be taken by the United States and made a part of an Indian reservation. There was disagreement between the two judges who passed initially on the motion to set aside the verdict, and the jurisdictional question was certified to the Supreme Court.

Thus, the question before the Court was not whether title in fee to the section 16 was in the United States or in the State of Wisconsin, but whether the section 16 was within the limits of the reservation. Of course, it was possible that the Court might have taken the view that unless title in fee resided in the United States when the reservation was created, the section 16 could not lawfully have been included in the reservation. But clearly it did not take that view.

Although the true basis for the holding in *Thomas* is obscure, it appears that the Court found jurisdiction to be present in the federal court on one or more of three grounds: (a) By the treaty of 1842, the Chippewas were granted the right of occupancy to the section 16 in question. This right was never terminated by them or by the United States by the treaty of 1854 or otherwise. Any title which may have vested in the State was subordinate to this right of occupancy. (b) In light of the considerations stated in (a), the State had no control over or right to the

section 16 in question such as to prevent its inclusion in the reservation provided for in the treaty of 1854, and it was so included. (c) "[I]ndependently of any question of title," 151 U.S. at 585, 14 S.Ct. at 429 (that is, presumably, even if the State had acquired earlier title in fee unencumbered by any right of occupancy by the Chippewas), because of the special guardian-ward relationship between the national government and the Indians, it was within the power of the national government to assert the jurisdiction of its courts over certain acts by Indians committed within certain geographical areas described as "reservations."

Obviously, ground (c) is unrelated to the contention by the United States in the present case that it holds fee simple title to the sections 16 in question.

With respect to grounds (a) and (b), the opinion in *Thomas* plainly does not reject the proposition that title to the sections 16 in question had passed from the United States to the State, although it does reject the proposition that the State's title was of such a nature as to extinguish the Chippewas' right of occupancy or as to prevent the inclusion of the sections 16 "within the limits of any Indian reservation" as that phrase is used in the statute vesting in the federal court jurisdiction over certain crimes by Indians. For example, the Court stated (at 583, 14 S.Ct. at 428): "Whatever right the state of Wisconsin acquired by the enabling act to the sixteenth section was subordinate to this right of occupancy . . ." The Court cited with approval (at 583) the general rule of the Land Department that title to school lands "vests in the several states in which the land is situated, subject to any prior right of occupation by the Indians . . ." It also

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cited with approval (at 583-584, 14 S.Ct. at 428) a previous decision in *Beecher v. Wetherby*, 95 U.S. 517, 24 L.Ed. 440

(1877), in which it had been held that the State could take the "naked fee" to Indian occupied school lands, but could not disturb the occupancy of the Indians. The Court concluded (at 584-585, 14 S.Ct. at 429) that "title [to the section 16 at issue] never vested in the state, except as subordinate to that right of occupation of the Indians."

Because in *Thomas* the Supreme Court did not sustain the contention presented by the United States in the present case, it should be unnecessary to discuss the doctrine of *stare decisis* with respect to *Thomas*. Nevertheless, *Thomas* dealt with a section 16, and a section 16 in the very reservation involved in the present controversy. Also, a measure of obscurity marks the rationale of the *Thomas* decision. Conceivably another court may read *Thomas* differently. Therefore, I will assume, although disagreeing with the assumption, that implicit in the *Thomas* holding is the proposition that the United States enjoys fee simple title to the sections 16 here in issue. The question is whether I am bound by such an implicit holding, as, of course, I would usually be bound.

As I have noted earlier, it has become well established that treaties with the Indians must be construed as the Indians would have understood them as disclosed by the practices and customs of the Indians at the times of negotiation, the history of the treaties including the history of the negotiations, and the practical construction given the treaties by the parties. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 90 S.Ct. 1328, 25 L.Ed.2d 615 (1970); *United States v. Top Sky*, 547 F.2d 486 (9th Cir. 1976).

In *Thomas*, there was sent up to the Supreme Court the entire record of the proceedings in the trial court. This included the pleadings, the evidence on the trial, and an agreed statement of facts by counsel. Because the case reached the Supreme Court on a certificate of division in opinion between the two judges in the trial court, the

Supreme Court held itself limited to consideration of the "pleadings in the case" and "public statutes or treaties bearing upon the point certified." 151 U.S. at 580-581, 14 S.Ct. at 427. The pleadings consist of the indictment, which alleges the elements of the offense and describes the location of the offense as "within the limits of an Indian reservation," and the defendant's not guilty plea. In these pleadings there is no explanation of why the location of the offense may have been within or without the limits of the reservation. Those portions of the record which the Supreme Court declined to consider contained minimal information about the historical context in which the relevant treaties were entered into or about the practical construction afforded the treaties by the parties.

Inasmuch as the Supreme Court felt free in *Thomas* to consider the relevant treaties, it seems that it would have been free to exercise judicial notice of their historical context, as that Court has frequently done. However, in *Thomas* the court limited its consideration to the language of the 1842 and 1854 treaties.

In the present case in this court, I have taken judicial notice of much historical information included in the record and some not so included.

The contrast between the factual record available to the Supreme Court in *Thomas* and that now available to me is demonstrable as to a matter of true importance. With respect to grounds (a) and (b) for its holding, as I have described them above, the Court referred in *Thomas* (at 584, 14 S.Ct. at 429) to "the fact that the section is included within the tract set aside as a portion of the permanent reservation . . ." Included in that part of the record in *Thomas* not considered by the Supreme Court was some evidence about the selection of lands for the Lac Courte Oreilles reservation in 1859. But nowhere in the *Thomas* record in the Supreme Court was there information concerning the re-selection of the lands in 1873.

Without that information about the practical construction the parties had given the treaties (see *United States v. Top Sky, supra*), the Court assumed that the reservation was "to embrace three full townships . . . to be,

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as near as possible, in a compact form . . ." 151 U.S. at 582, 14 S.Ct. at 428. The Court later concluded (151 U.S. at 584, 14 S.Ct. at 429):

That [1854] treaty provided for permanent reservations, which included the section in question. The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force.

As clearly shown by the evidence in this present case, not considered in *Thomas*, the parties to the treaty did not envision a reservation of three "full" townships, but chose the reservation land by sections, both in 1859 and 1873.¹⁵

¹⁵The record before the Supreme Court in *Thomas* contained no evidence of the President's 1850 removal order. That this omission was a critical factor in the Court's decision is indicated by this language (151 U.S. at 582 and 584, 14 S.Ct. at 428, 429):

The Indians have never been removed from the lands thus ceded, and no executive order has ever been made for their removal, and no change has taken place in their occupancy of the lands, except as provided by the treaty of September 30, 1854, 10 Stat. 1109.

We, therefore, are of opinion that by virtue of the treaty of 1842, in the absence of any proof that the Chippewa Indians have surrendered their right of occupancy, the right still remains with them, and that the title and right

[22] The differences between the factual record in *Thomas* and in the present case are such that, even assuming that in *Thomas* the United States was impliedly held to enjoy fee simple title to the section 16, I should not apply that holding mechanically to the present case. Under these circumstances, the doctrine of *stare decisis* is not so rigid as to require me to decide the present case in an unjust manner. See *United States v. Moore*, 62 F.Supp. 660, 663 (W.D.Wash.1945), *aff'd* 157 F.2d 760 (9th Cir.), *cert. denied* 330 U.S. 827, 67 S.Ct. 867, 91 L.Ed. 1277.

Accordingly, in this case I will make a fresh analysis of the issue of title to the sections 16 in light of the historical facts as I have found them.

The parties' theories

There are three parties or groups whose interests are implicated in this quiet title action: the Lac Courte Oreilles Band, which is not a party but appears *amicus*; the plaintiff United States; and the defendant State of Wisconsin and those who claim interests through the State (in this paragraph I will refer to this latter group as the State). By initiating the lawsuit, the United States has presented a thesis: that it holds title in fee to the

which the State may claim ultimately to the sixteenth section of every township for the use of schools is subordinate to this right of occupancy of the Indians, which has, so far as the court is informed, never been released to any of their lands, except as it may be inferred from the provisions of the treaty of 1854.

For reasons stated hereinafter, I do not consider the President's 1850 removal order dispositive of the issue whether the United States now holds fee simple title to the sections 16 at issue. Therefore, the Supreme Court's lack of awareness in *Thomas* of the existence of that order is not of critical significance presently. But this lack of awareness of a major event illustrates rather dramatically the handicap imposed upon the Supreme Court by the narrowness of the factual record it considered.

disputed sections 16 for the benefit of the Band. If the United States succeeds in obtaining a declaratory judgment to this effect, the interest of the State will be extinguished; since the United States and the Band are allied in interest, the entire controversy will be resolved. But in the defense of this case, a counterthesis has been presented: that during a period from 1846 to 1873 events occurred as a result of which unencumbered title to the disputed sections 16 vested in the State. If defendants succeed in obtaining a declaratory judgment to this effect, the interest of the United States will be extinguished. Because the Band is not a party to this action, its interest, if any, will not be extinguished, but, of course, the precedential effect of the declaratory judgment in this case will become a grave obstacle for the Band to overcome in any future litigation.

I have decided that the following opinion will probably be more understandable if it is organized in terms of the defendants' counter-thesis. Defendants' counter-thesis

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begins with the enabling Act of 1846 by which all sections 16 within public lands and within the boundaries of the proposed State of Wisconsin would be granted to the State except "where such section has been sold or otherwise disposed of." The grant of particular sections 16 to the State was to occur when a survey which included them was accepted by the Surveyor General of the United States. In 1848 Wisconsin became a State. Defendants contend: The sections 16 at issue were public lands. They had not "been . . . otherwise disposed of." If it should be held that as of 1846 or 1848, they had been otherwise disposed of in the sense that the Indians retained certain rights of occupancy following the treaties of 1837 and 1842, these rights were terminated by the Presidential

removal order of 1850. If it should be held that the removal order did not terminate any rights of occupancy by the Indians then persisting, such rights were terminated under the treaty of 1854 at the time when, pursuant to said treaty, the boundaries of the reservation were finally defined to exclude the disputed sections 16. Thus, the argument runs, the title in the United States passed to the State when the Surveyor General accepted the survey in 1856, subject to whatever rights to the land were then enjoyed by the Indians, and the State's title became unencumbered when those rights of the Indians, if any, terminated.

I will undertake now to test this counter-thesis as against the contentions raised by the United States and by the Band as *amicus*.

[23,24] It has long been accepted in the law of the United States that Europeans who conquered the North American continent have fee title to the lands they have conquered, while the original inhabitants of those lands, the Indians, have a continued right to occupy their lands. This right of occupation is frequently called "aboriginal" or "Indian" title. *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272, 75 S.Ct. 313, 99 L.Ed. 314 (1955); *see also Johnson v. McIntosh*, 21 U.S. (8 Wheat) 543, 5 L.Ed.2d 681 (1823). Aboriginal title is defined as title based upon actual, exclusive and continuous occupancy for a long time. *Strong v. United States*, 518 F.2d 556, 207 Ct.Cl. 254 (1975); *Sac and Fox Tribe of Indians of Oklahoma v. United States*, 315 F.2d 896, 161 Ct.Cl. 189 (1963), *cert. den.* 375 U.S. 921, 84 S.Ct. 266, 11 L.Ed.2d 165. Only the sovereign, the United States, may extinguish that aboriginal title. *Oneida Indian Nation v. County of Oneida*, N. Y., 414 U.S. 661, 94 S.Ct. 772, 39 L.Ed.2d 73 (1974).

Another kind of Indian title to lands is "recognized" or "treaty" title, defined as an acknowledgment by the

United States that the Indians have a legal right permanently to occupy and use a certain tract. When the United States acknowledges that the Indians have a legal right of occupancy and use, but less than permanently, it is described as a right of "permissive occupation." *Tee-Hit-Ton Indians, supra*; *Strong, supra*; *Sioux Tribe v. United States*, 500 F.2d 458, 205 Ct.Cl. 148 (1974); *Sac and Fox Tribe, supra*.

The evidence indicates, and I will assume for the purposes of evaluating the claims in this case, that the Chippewa had aboriginal title to the land at issue in northern Wisconsin at least until 1837.

It is the fee title based on the European conquest which the United States asserts in this suit, and which the State contends was granted it by the United States through the 1846 enabling Act of Congress.

Whether, beginning in 1837, the Chippewa lost their aboriginal title but retained rights in the disputed land and, if so, what was the nature of those rights are matters that require inquiry.

*From aboriginal title to right of
permissive occupation*

[25] Extinguishment of Indian title may be "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise . . ." *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 at 347, 62 S.Ct. 248, 252, 86 L.Ed. 260 (1941). "But an extinguishment cannot be lightly implied in view of the avowed solicitude of the Federal Government for the welfare of its Indian wards." *Id.* at 354, 62 S.Ct. at 255. *See*

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also *United States v. Gemmill*, 535 F.2d 1145 (9th Cir. 1976); *State of New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976); *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, 206 Ct.Cl. 649 (1975); *United States v. Kiowa, Commanche, and Apache Tribes of Indians*, 479 F.2d 1369, 202 Ct.Cl. 29 (1973), cert. denied *Wichita Indian Tribe of Oklahoma v. United States*, 416 U.S. 936, 94 S.Ct. 1936, 40 L.Ed.2d 287.

In the present case, it is quite clear that the United States intended to extinguish the Indians' aboriginal title to the land ceded in 1837. It sought to end the exclusivity of their occupation by opening the land for white settlement, and it sought the right to establish logging camps without fear of reprisal by the Indians. Those purposes were clearly contrary to the Indians' right to exclusive occupation of the land, and thus required termination of that right.

[26] However, as I pointed out in *United States v. Bouchard*, *supra*, treaties with Indians must be construed as the Indians would have understood them. See *Choctaw Nation v. Oklahoma*, *supra*; *Choctaw Nation v. United States*, 119 U.S. 1, 7 S.Ct. 75, 30 L.Ed. 306 (1886); *Worcester v. Georgia*, 31 U.S. (6 Peters) 515, 8 L.Ed. 483 (1832); and the cases cited at footnote 7.

Even applying liberal rules of treaty construction to the 1837 treaty, I conclude that when they signed it, the Indians knew they were relinquishing significant rights in their land, including the right to expel whites who worked or settled in the territory. Probably the Indians did not understand legal concepts of title and aboriginal title, but the remarks of the spokesman Aish-ke-bo-gi-ke-she on the last day of the treaty council indicate their understanding of a relinquishment of significant rights in the land: "Your children are willing to let you have

their lands, but they wish to reserve the privilege of making sugar from the trees and getting their living from the Lakes and Rivers, as they have done heretofore, and of remaining in [the] country." It is also clear that they understood that white people would live in the territory, at least to engage in logging. As the Indians' later statements indicate, they understood that they should not attack whites moving onto the ceded lands.

Similarly, in negotiating the 1842 treaty, in which the Chippewa ceded more lands and agreed that the Lake Superior and Mississippi tribes would share annuities from both treaties, the Indians knew they were relinquishing significant rights in their land, and that they would be required to share occupancy with soldiers, loggers and miners. When the removal order came in 1850, the interpretations the Indians gave to the treaty show that they understood they could be removed from the land at some time; the dispute concerned the time and the reasons for removal. The 1837 and 1842 treaties were quite similar and appeared to be closely linked in the minds of the Indians, so their interpretation of one treaty is probative of their understanding on the other.

Accordingly, I conclude that the Indians relinquished their aboriginal right of occupancy to the land at issue in 1837. Since the right of occupancy which they reserved was clearly not a permanent right, they retained only the right of "permissive occupation." *See also Mole Lake Band, et al. v. United States*, 139 F.Supp.938, 134 Ct.Cl. 478 (1956), *cert. denied*, 352 U.S. 892, 77 S.Ct. 130, 1 L.Ed.2d 86.

The 1850 removal order

[27] Defendants argue, then, that the President's removal order of 1850 terminated the right of permissive occupation granted by the 1837 treaty. Plaintiff and

amicus make a number of arguments in response.¹⁶

Of these, the principal contention is that made by *amicus* to this effect: The 1850 removal order was not authorized by the 1837 and 1842 treaties, and so was invalid. The words of both the treaties of 1837 and 1842 allow removal at the "pleasure of the President," but the minutes of the 1837

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treaty council and the recollection of those involved in the 1842 treaty negotiations indicate that those words were orally modified by the treaty commissioners. The President was not given unlimited discretion by the treaties to order removal, but rather discretion limited by the treaty commissioners' oral assurances to the Indians that they would probably not be removed for a long time, perhaps never, as long as they did not "misbehave" by harassing white settlers. They did not misbehave.

As I noted above, it is clear that in construing a treaty with the Indians, the court should look beyond the words of the treaty to the negotiations and other circumstances, and that considerable weight should be given to the Indians' reasonable understanding of the treaty.

Indicating the Indians' expectation of a long-term occupancy, in 1837 an Indian spokesman sought an annuity for sixty years, saying: "At the end of that time our grandchildren who will have grown up, can speak to you for themselves." And on the final day of treaty negotiations in 1837, an Indian spokesman told Commissioner Dodge of the Indians' dependency on the land for their survival: "You know we can not live, deprived of our Lakes and Rivers; There is some game on the lands yet;

¹⁶The Lac Courte Oreilles Band filed an *amicus* brief in support of the plaintiff's motion for summary judgment in this case.

and for that reason also, we wish to remain upon them, to get a living." Commissioner Dodge replied in part that it would "probably be many years before your Great Father will want all these lands for the use of his White Children." Similarly, both Indians and non-Indians who were present at the 1842 treaty negotiations later wrote that the Indians were assured that they would not be required to remove from their lands for a long time, possibly never, unless they misbehaved in some way. This assurance was important to their agreement to sign the treaty.

It appears quite reasonable, and eminently just, to construe the 1837 and 1842 treaties as implying the limitation that the President could not require removal for many years, unless the Indians seriously misbehaved.

The question arises whether the condition precedent to a valid removal order had been met when the 1850 order was promulgated.

I have found no direct evidence of the President's reasons for issuing the 1850 removal order. But it does appear that the order was recommended by the Commissioner of Indian Affairs and the Interior Department. Thus, the best evidence of the reasons for removal is the reports and actions of the Commissioner of Indian Affairs in 1846 through 1849. That evidence reflects the Commissioner's overriding concern with accomplishing the Bureau's long-term goal to remove all Indians to locations west of the Mississippi and to confine them to small areas where government officials could civilize them more easily.

The 1846, 1847, and 1848 reports do not mention Chippewa misbehavior as a reason for removal, focusing rather on the benefits of removal to the Indians and the government. The 1849 report mentions possible Indian misbehavior only in the most general terms, referring to the "tranquility of citizens who suffer annoyance and

loss from depredations." Similarly, the Minnesota assembly resolution is vague about Indian behavior, noting the need to "ensure the security and tranquility of the white settlements." In addition, the assembly's resolution suggests another reason for its removal request by its mention of the Indians' "extensive and valuable district." The LaPointe sub-agents were more specific about conflicts between whites and Indians in 1847 and 1849. Yet in 1847 the sub-agent's conclusion was that whites, rather than Indians, had misbehaved. In 1849 the sub-agent did not assign guilt for the disturbances between the races, other than to blame Indian misconduct on the Indians' easy access to whiskey. The Indians, the missionaries and the miner who protested the issuance of the removal order by letters written in 1851 indicate that conflicts between whites and Indians were infrequent and of the type likely to occur whenever people live in close proximity to one another.

The Commissioner's attempt to obtain Chippewa agreement to removal in 1847

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also indicates a policy motive, rather than punitive motive, for his removal efforts.

In sum, the evidence before this court does not reveal the kind of serious misbehavior by Indians which would have justified removal under the terms of the 1837 and 1842 treaties. Rather it appears that the President and other governmental officials were influenced by the long-term goal of the Interior Department to remove all Indians to locations west of the Mississippi where they could be confined to small areas and forced to adopt what these officials considered to be the civilized ways of the white people. Thus, I hold that the removal order of 1850 was not authorized by the treaties of 1837 or 1842, was beyond the scope of the President's powers, and was

without legal effect. Any forcible removal of the Indians which may have taken place pursuant to that order was also without legal effect. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339 at 355-356, 62 S.Ct. 248, 256, 86 L.Ed. 260 (1941), where the court held:

Their [an Indian tribe's] forcible removal in 1874 was not pursuant to any mandate of Congress. It was a high-handed endeavor to wrest from these Indians lands which Congress had never declared forfeited. No forfeiture can be predicated on an unauthorized attempt to effect a forcible settlement on the reservation, unless we are to be insensitive to the high standards for fair dealing in light of which laws dealing with Indian rights have long been read.

See also Turtle Mountain Band of Chippewa Indians v. United States, 490 F.2d 935, 203 Ct.Cl. 426 (1974).

Accordingly, I conclude that neither the removal order nor the attempted, but largely unsuccessful, removal efforts terminated the Chippewa's treaty right to occupy the land at issue.¹⁷

¹⁷My holding that the 1850 removal order was invalid makes it unnecessary to pass upon other contentions by *amicus* about that order. However, few comments on them seem appropriate.

Amicus points out that the removal order revokes the privileges granted to the Mississippi tribe by the 1837 treaty and the rights granted the Lake Superior and Mississippi tribes by the 1842 treaty. Since Lac Courte Oreilles is a Lake Superior tribe which was a party to the 1837 treaty, *amicus* contends that its 1837 treaty privileges were exempted from the revocation. The 1837 treaty was with the Chippewa Nation, making no tribal distinction. It was later determined that only Mississippi Chippewa would receive the treaty annuities. When the 1842 treaty was negotiated, the 1837 treaty was referred to incorrectly as one "made with the Chippewas of the Mississippi." (Article V). It is highly probable that the removal order language was based upon this incorrect language of the 1842 treaty. The evidence shows that the purpose of the removal order was to move all the

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*Effect of 1854 treaty on ceded lands
not included in the contemplated reservation*

The next question, therefore, is this: Was the effect of the 1854 treaty to terminate the Chippewa's right of permissive occupation in that territory ceded in 1837 and 1842 and not included in the reservation contemplated by the 1854 treaty?

The United States Court of Claims has succinctly summarized current principles for determining whether establishment of a reservation extinguished Indian rights to land outside the reservation. In *United States v. Pueblo of San Ildefonso*, 513 F.2d 1383, at 1388, 206 Ct.Cl. 649 (1975) it is said:

Indians to locations west of the Mississippi River, to clear the way for white settlement, and that both the Indians and the United States construed the removal order as requiring removal of all Chippewa in Wisconsin.

Amicus argues that the removal order was repealed by an executive order in 1852. There is no written record of the executive order to which *amicus* refers, except for Armstrong's report that the President told the Indians in 1852 that he would countermand the removal order, and that the President gave Chief Buffalo a written instrument explaining his promises. Armstrong records the promise of a countermand as a promise of future action. Another indication of the futurity of any Presidential promise which may have been made is that when Buffalo explained the President's promises to the Chippewa, he told them that they had one more treaty to make with the President.

Plaintiff and *amicus* contend that because the removal order did not result in actual removal by the Chippewa, it should be held to have had no legal effect on the Chippewa's right to occupy the ceded territory. If the order was valid and was not repealed, it terminated the Indians' treaty right of permissive occupation. Whether the Indians actually complied with the order does not affect its legal status. A valid removal order would have left the Indians without any legal interest in the land, permitting fee title to pass to the state unencum-

It should be clear by now that the creation of an Indian reservation does not invariably extinguish aboriginal title claims to outlying areas. In *Santa Fe* [314 U.S. 339, 62 S.Ct. 248 (1941)], the Supreme Court dispelled any notion that the establishment of a reservation automatically destroys Indian title claims based upon aboriginal ownership. *See, id.*, 314 U.S. at 351-56, 62 S.Ct. 248. As this court has most recently stated in *Gila River, supra*, 494 F.2d [1386] at 1390, 204 Ct.Cl. [137] at 144: "[t]here is no Procrustean rule that the creation of a reservation rigidly stamps out aboriginal rights." The particular facts and circumstances surrounding the establishment of a reservation in a given historical context may be such that that event will be deemed to have constituted a relinquishment of tribal claims to lands outside the reservation. But the rule to be followed, as succinctly and well stated by the court in *Turtle Mountain Band, supra*, 490 F.2d [935] at 946, 203 Ct.Cl. [426] at 446, is that "*** Indian settlement on a reservation should be seen as an abandon-

bered, pursuant to the enabling Act's provisions. To the extent that language in *United States v. Thomas*, 151 U.S. at 582, 14 S.Ct. at 428, may suggest that both a valid removal order and actual removal were necessary to terminate the Indians' right of permissive occupancy, it must be considered pure dicta in light of the Court's mistaken belief that no removal order was ever promulgated. *State v. Gurnoe*, 53 Wis.2d 390, 406-407, 192 N.W.2d 892 (1972), does support plaintiff's contention that lack of compliance with the 1850 removal order rendered it "ineffective" and that the order "did not result in actual revocation" of pre-existing Indian rights. I respectfully disagree with this view of the Supreme Court of Wisconsin. In any event, in *Gurnoe*, the Court decided (at 406, 192 N.W.2d 892), on wholly distinct grounds, that the 1854 treaty terminated whatever previous legal effect the 1850 removal order may have had upon the Indians' fishing rights in Lake Superior.

ment of claims only when the specific circumstances warrant that conclusion."

Although the passage just quoted refers to aboriginal title claims, it seems equally applicable to claims to the right of permissive occupation.

In *United States v. Santa Fe Pacific R. Co.*, referred to in the passage just quoted, Congress had first established a reservation for the Walapai Indians by legislation. The Court reviewed the legislative history of the act, concluding that Congress intended to make an offer to the Walapais to provide a reservation only if they would forsake their ancestral lands. The Walapais did not agree to abandon their lands and did not accept the Congressional offer, the Court found, so there was no extinguishment of their claims to non-reservation lands. However, a "quite different" situation had arisen later, in 1881, when the tribal council presented a proposal to a federal military officer to establish a reservation for them. Pursuant to that recommendation a military reservation was constituted in 1881, and approved as the Walapai Indian Reservation by the President in 1883. The court found "an indication that the Indians were satisfied with the proposed reservation," and concluded (314 U.S. at 357-358, 62 S.Ct. at 257):

[I]n view of all the circumstances, we conclude that its creation at the request of the Walapais and its acceptance by them amounted to a relinquishment of any tribal claims to lands which they might have had outside that reservation

The court explained its holding further (at 358, 62 S.Ct. at 257):

The lands were fast being populated. The Walapais saw their old domain being preempted. They wanted a reservation while there was still

time to get one. That solution had long seemed desirable in view of recurring tensions between the settlers and the Walapais. In view of the long standing attempt to settle the Walapais' problem by placing them on a reservation, their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation. They were in substance acquiescing in the penetration

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of white settlers on condition that permanent provision was made for them too. In view of this historical setting, it cannot now be fairly implied that tribal rights of the Walapais in lands outside the reservation were preserved. That would make the creation of the 1883 reservation, as an attempted solution of the violent problems created when two civilizations met in this area, illusory indeed. We must give it the definitiveness which the exigencies of that situation seem to demand. Hence, acquiescence in that arrangement must be deemed to have been a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others.

With the major exception that violent conflict seems to have been absent in Wisconsin, the circumstances surrounding the establishment of the Chippewa reservations by the treaty of 1854 are somewhat similar to those enumerated in *Santa Fe, supra*. The Chippewa had been ordered to remove, and pursuant to that order had made several disastrous trips to Minnesota to receive their annuities. Clearly, they wanted to remain on their ceded lands: they had petitioned Congress in 1849 for permanent reservations; they had refused to remove

when ordered to do so; and Indian Agent Gilbert had reported in 1853 that possible removal was the "great terror of their lives." Additionally, 1854 treaty interpreter Armstrong wrote that the Indians had agreed not to give any more lands unless the government gave them "reservations at different points of the country . . . that should afterwards be considered their bona fide home."

[28] The facts surrounding the 1854 treaty indicate that both the United States and the Indians perceived it as extinguishing Chippewa rights to occupy lands outside the reservation. The Commissioner of Indian Affairs noted in 1854 that it might be necessary to allow the Chippewa to remain on ceded lands in "small reservations." And Chief Buffalo stated during treaty negotiations that the Indians understood that the whole of their lands, "with the exception of what we shall reserve, goes to the great father forever."

The language of the 1854 treaty supports this interpretation. Article 11 provides: "[S]uch of them [the Chippewa] as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President." The "territory hereby ceded" in the 1854 treaty was territory in northern Minnesota which was wholly separate and distinct from that ceded in 1837 and 1842. The 1854 treaty contains no other language preserving rights of permissive occupation in the Indians. In the 1837 and 1842 treaties the parties had expressly preserved the rights of permissive occupation in the territories then ceded. Had they intended the 1854 treaty to continue to preserve those rights in the territory ceded in 1837 and 1842, it is reasonable to believe that they would have made it explicit in 1854.

I conclude that by the treaty of 1854, the Chippewa surrendered their rights of permissive occupation in the territory ceded in 1837 and 1842, except to the extent that portions of the territory so ceded were to become parts of

the reservations provided for in the treaty of 1854.

*The exclusion of the sections 16 at issue
from the reservation*

[29] I must determine, then, the time at which the Lac Courte Oreilles reservation provided for in the 1854 treaty actually came into being and whether the sections 16 at issue were included in it.

The pertinent words of the treaty of 1854 are:

The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:

3d. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Courte Oreilles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

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The facts relating to the subsequent selection of specific boundaries, as I have found them, may be summarized as follows: A survey of the land in the vicinity of Lac Courte Oreilles was made in 1855 and accepted by the Surveyor General on February 20, 1856. In 1859, a special agent was appointed by the Office of Indian Affairs to confer with the Lac Courte Oreilles chiefs to select a tract "equal in extent to three townships . . ." The instructions were that the selection should be made from nine townships which had been reserved for the purpose. The lands selected by the chiefs and the federal agent in 1859 included all of each of two townships

and parts of three other townships. Uncertainties arose, however, concerning the exact location of some of the boundaries, and difficulties persisted until December 18, 1872, when the Indian Agent was instructed by the Commissioner of Indian Affairs to adjust the selection; these instructions included a specific instruction to omit all sections 16 from the final selection. On February 13, 1873, the final list, omitting any section 16, was presented to the Acting Commissioner and it was approved by the Secretary of the Interior on March 1, 1873.

In opposing the view that the reservation provided for in the 1854 treaty was not created until the boundaries had been defined in 1859, and amended in 1873, plaintiff makes two contentions. One is that although the provisions of the 1854 treaty left the outer boundaries of the reservation undefined, a reservation which included the disputed sections 16 came into being when the treaty was entered into. The second and somewhat related point is that following the execution of a treaty, when Indians proceed to occupy a parcel of land without objection from the United States, that parcel becomes the reservation; and that the sections 16 at issue were included within lands so occupied by the Chippewa following the execution of the 1854 treaty. Plaintiff cites several decisions as supportive of one or both of these contentions.

In *Minnesota v. Hitchcock*, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954 (1902), the issue was whether a certain tract was a reservation or unceded Indian country. The Court held that it was a reservation, saying (at 389-390, 22 S.Ct. at 657):

While there was no formal action in respect to the remaining tract, the effect was to leave the Indians in a distinct tract reserved for their occupation, and in the same act this tract was spoken of as a reservation. Now, in order to create a reservation it is not necessary that

there should be a formal cession or a formal act setting apart a particular tract. It is enough that from what has been done there results a certain defined tract appropriated to certain purposes. Here the Indian occupation was confined by the treaty to a certain specified tract. That became, in effect, an Indian reservation.

In *Spalding v. Chandler*, 160 U.S. 394, 16 S.Ct. 360, 40 L.Ed. 469 (1896), the Indians had sold to the government land at Sault Ste. Marie, retaining a privilege of fishing at the falls there, along with a convenient encampment. The Indians encamped at the "convenient encampment" at the time the treaty was signed in 1820 until the time of the lawsuit, and the place was marked as an Indian reserve on maps of the area. A dispute arose when a white man attempted to gain title to the area by squatting there. The court held that the Chippewa were in actual use and occupancy of the land from 1820, and that both parties to the treaty had accepted the tract as a reservation, concluding: "If the reservation was free from objection by the government, it was as effectual as though the particular tract to be used was specifically designated by the boundaries in the treaty itself." 160 U.S. at 404, 16 S.Ct. at 364.

In *United States v. Carpenter*, 111 U.S. 347, 4 S.Ct. 435, 28 L.Ed. 451 (1884), the government had agreed to reserve from sale, for the use of the Indians, a specific area, the Red Pipestone Quarry, or so much of the quarry as necessary for the Indians to procure stone for pipes. Through government error, a conflicting appropriation of part of the quarry was made and a title dispute arose. The Court held that after the treaty and until a specific portion of the quarry was set aside for Indian use,

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the whole of the quarry was withdrawn from private

entry or appropriation until the government determined whether any lesser portion than the whole should be reserved for the Indians' use: "[T]he treaty was notice that a part of the quarry would be retained by the government, and that the whole might be, for the use of the Indians." *Id.* at 349, 4 S.Ct. at 436. The boundaries of the quarry were definite, but provisional, boundaries for the reservation.

In *New York Indians v. United States*, 170 U.S. 1, 18 S.Ct. 531, 42 L.Ed. 927 (1898), the issue was whether a reservation grant made by treaty was *in praesenti* or *in futuro*. One of the major reasons the Court gave for determining that the grant was *in praesenti* was that (170 U.S. at 20, 18 S.Ct. at 535):

The lands covered by the treaty were identified, described by metes and bounds, and an appropriation was made to aid in the immediate removal of the Indians to their new home. There was no uncertainty as to the lands granted, or as to the identity of the grantees, which, in the case of *Heydenfeldt v. Daney Mining Co.*, 93 U.S. 634 [23 L.Ed. 995,] was held to turn it into a grant *in futuro*.

I read *Minnesota v. Hitchcock*, *Spalding v. Chandler*, *United States v. Carpenter*, and *New York Indians v. United States* to support the proposition that definite boundaries are necessary to the creation of an Indian reservation, although that definition may be achieved either by an explicit written description or by long continued and consented to occupation within well understood contours.

In the present case, definition by a final and explicit written description did not occur until 1859 and 1873. The treaty itself did not refer to three specific townships but only to a tract "equal in extent to three townships . . ." The practical construction given the treaty by the parties

five years later was that from an area consisting of nine townships, entire townships or parts of townships were to be selected aggregating in acreage the total acreage of three townships (69,120).

There is no evidence that following the execution of the 1854 treaty, the Lac Courte Oreilles Band commenced a long continued and consented to occupation within well understood contours which included the sections 16 at issue. The record permits no finding as to where the Band was situated from 1854 to 1859. Ambiguous evidence suggests that in 1859 its members were in the vicinity of the Menomonee and Red Cedar Rivers where they had sojourned from "the reservation provided for them at Lac Courte Oreilles." From about 1859 until 1873, it can be inferred that they occupied the lands selected in 1859, which did include the sections 16 at issue. But, of course, any inference that this period of occupation crystallized those boundaries permanently is destroyed by the express choice of different boundaries in 1873.

I conclude that the manner in which the Lac Courte Oreilles reservation was created was by express written agreement as to its boundaries within the broad framework provided for in the 1854 treaty. I also conclude that the time at which the reservation was thus created was 1859, and that the boundaries of the reservation then created were expressly modified by the parties in 1873.

*Nature of Indians' interest from
1854 to 1873*

A question arises, then, about the existence and nature of the Lac Courte Oreilles Band's occupancy rights on the lands at issue subsequent to 1854. If by the 1854 treaty the Chippewa surrendered their right to occupy the territory ceded in 1837 and 1842 in exchange for the reservations contemplated by the 1854 treaty, as I have held, it seems clear that they did not surrender the right of permissive occupation until the time at which

their reservations had actually been created for their use. It would be unreasonable to construe the 1854 treaty as an immediate relinquishment of occupancy rights by those Indians whose reservations were not immediately established, since the legal effect of such a construction would be that the Indians would

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have had no occupancy rights anywhere until the reservation boundaries were established. That clearly is not what the Indians bargained for in 1854. Accordingly, I hold that the Lac Courte Oreilles Band retained its permissive right to hunt, fish, and otherwise occupy all of the ceded lands, including the disputed sections 16, until such time as the boundaries of their reservation were definitively and finally established.

Manner and timing of creation of State's interest

[30] By the 1846 enabling Act, the United States provided for the transfer of its fee title, obtained by the European conquest, to the public land sections 16 within the anticipated boundaries of the prospective state, except "where such section has been sold or otherwise disposed of." Wisconsin was admitted to statehood by Act of Congress in 1848. It has been held that such grants by the United States approves surveys of the lands affected. *See United States to the new states* become effective when the Surveyor General of the United States approves surveys of the lands affected. *See United States v. Wyoming*, 331 U.S. 440, 443, 67 S.Ct. 1319, 91 L.Ed. 1590 (1947), *United States v. Morrison*, 240 U.S. 192, 201, 36 S.Ct. 326, 60 L.Ed. 599 (1916), *Heydenfeldt v. Daney Gold & Silver Mining Co.*, 93 U.S. 634, 23 L.Ed. 995 (1876).

As of Wisconsin's admission to statehood in 1848, the sections 16 at issue were public lands which the United States had not sold to anyone and which it had not "otherwise disposed of," unless that phrase is construed to cover the agreement by the United States with the

Chippewa in the 1837 treaty that the Chippewa would thereafter enjoy the right of permissive occupation of the lands then ceded by the Chippewa (which included the three sections 16). I construe the Acts of Congress in 1846 and 1848 as an expression of the following commitment by the United States to the State: that at such time as the Surveyor General of the United States should approve a survey of the three sections 16 at issue, fee simple title to those sections would pass to the State, subject to the Chippewa's right of permissive occupation recognized by the treaty of 1837 and subject to whatever agreement the United States might reach with the Chippewa to substitute some other arrangement for the said right of permissive occupation.

In 1854, before these sections 16 had been surveyed on behalf of the Surveyor General, the United States entered into the treaty with the Chippewa which contemplated the creation of reservations, including the Lac Courte Oreilles reservation, as an arrangement to be substituted for the Chippewas' right of permissive occupation of the lands ceded in 1837 and 1842. I consider that as of 1854, following the making of the treaty, the United States remained committed to the proposition that fee simple title would pass to the State upon approval of a survey, subject now to the contingency that any part or all of the three sections 16 now in dispute might become a part of the reservation when its boundaries were finally defined.

In 1856 the Surveyor General accepted a survey of lands which included the three sections 16 now in dispute. I consider that at that moment fee simple title passed from the United States to the State, subject to the contingency that any part or all of the three sections 16 might become a part of the reservation when its boundaries were finally defined.

In 1859, the boundaries of the reservation were

defined so as to include the three sections 16 now in dispute. I consider that at that moment fee simple title remained in the State, but subject to the major encumbrance consisting of the rights to be enjoyed by the Lac Courte Oreilles Band, as contemplated in the 1854 treaty, in the lands included in the reservation.

In 1873, a change in the boundaries of the reservation was agreed upon, and its boundaries assumed a final form. The disputed sections 16 were then not included within the reservation. I conclude that at that moment the fee simple title of the State was freed of any and all interests theretofore enjoyed by the Chippewa, and also freed of any and all interest theretofore enjoyed by the United States either in its own right or in any kind of fiduciary role it may ever have performed for the benefit of the Chippewa.

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Plaintiff disputes the correctness of the analysis just stated, contending that at the crucial moment in 1856 when the Surveyor General accepted the survey and when title to the three sections 16 might otherwise have passed to the State, they had been "otherwise disposed of," within the meaning of the 1846 enabling Act; that no interest, whether encumbered or unencumbered, passed to the State at that time; and that no interest in the State could "spring" thereafter by reason of subsequent events.

[31] I cannot accept such a construction of the term "or otherwise disposed of," as used in the 1846 Act. Although not framed in precisely this way, the substance of this issue was specifically reserved in *United States v. Morrison*, 240 U.S. 192, 213, 36 S.Ct. 326, 334, 60 L.Ed. 599 (1916):

... It is also argued that the State ... has the right to await the 'extinguishment' of the

'reservation' and the 'restoration of the lands therein embraced to the public domain,' and then to take the described [school] sections. We are not called upon to consider any such question here, and we express no opinion upon it, as there has been no extinguishment of the reservation . .

..

In *Beecher v. Wetherby*, 95 U.S. 517, 24 L.Ed. 440 (1877), however, the Court suggests the analysis which I have now adopted, namely, that in 1856 the State acquired the fee to the sections 16 at issue, subject to certain Indian interests and subject to certain contingencies with respect to the future modification of those Indian interests, and that when those encumbrances were terminated, the State's title became unencumbered. In *Beecher*, the issue centered on title to a section 16 which had been occupied by the Menominee Indians in Wisconsin. The court cited with approval (95 U.S. at 526) the holding in *United States v. Cook*, 19 Wall. (85 U.S.) 591, 22 L.Ed. 210 (1873): "[T]he right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy. The possession, when abandoned by the Indians, attaches itself to the fee without further grant." The Court then held (95 U.S. at 526):

In the present case, there can hardly be a doubt that Congress intended to vest in the State the fee to section 16 in every township, subject, it is true, as in all other cases of grants of public lands, to the existing occupancy of the Indians so long as that occupancy should continue. The greater part of the State was, at the date of the compact, occupied by different tribes, and the grant of sections in other portions would have been comparatively of little value. Congress undoubtedly expected that at no distant day the State would be settled by white people, and the semi-barbarous condition of the Indian tribes

would give place to the higher civilization of our race; and it contemplated by its benefactions to carry out in that State, as in other States, "its ancient and honored policy" of devoting the central section in every township for the education of the people.

The *Beecher* case is cited with approval in *Thomas*, 151 U.S., at 583, 14 S.Ct. at 428, where the Court also cited with approval the opinion of Mr. Justice Lamar, written while he was Secretary of the Interior:

That where the fee is in the United States at the date of survey, and the land is so incumbered that full and complete title and right of possession cannot then vest in the state, the state may, if it so desires, elect to take equivalent lands in fulfillment of the compact, or it may wait until the right and title of possession unite in the government, and then satisfy its grant by taking the lands specifically granted.

Plaintiff contends that a similar theory has been rejected by the Board of Land Appeals of the Department of the Interior in a decision entered November 24, 1972. There the Board rejected California's claim to swamp-lands which had not been swamplands at the date of enactment of the Swamp and Overflowed Lands Act of September 28, 1850. The Board held that unless the lands had been swamplands at the date of the Act, they could not fall within the Act's provisions. I consider the statutory and historical context of the swampland

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controversy too remote and different to shed light on the present controversy.

Estoppel of State

[32] Lastly, plaintiff contends that by virtue of the State's failure to appeal decisions by the Commissioner of the General Land Office, dated November 13, 1941, and February 19, 1942, denying the State's application for a patent to those lands, the State is estopped from claiming title to the sections 16 at issue. Plaintiff has not produced those administrative decisions and I cannot determine their significance. Even assuming their direct relevance, however, plaintiff has not shown the presence of other essential elements of equitable estoppel, such as whether plaintiff reasonably understood the State's failure to appeal the decision as a disclaimer of title to the lands, and whether plaintiff relied upon the implied disclaimer to its detriment. See *Hecht v. Harris, Upham & Co.*, 430 F.2d 1202 (9th Cir. 1970), and *Minerals & Chemicals Phillip Corp. v. Milwhite Co.*, 414 F.2d 428 (5th Cir. 1969). I hold that the State is not estopped in this action from asserting its title.

Upon the basis of the entire record, I hold that fee simple title to the sections 16 in dispute is vested in the State of Wisconsin and those claiming interests through the State, and that neither the United States nor the Lac Courte Oreilles Band enjoys any interest in said sections 16 except for any interest which may have been obtained subsequent to 1873 through the State or its successors in interest. An order to this effect is being entered at the foot of the consolidated opinion in these three cases.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. v. Lester P. Voigt, et al., 74—C—313

This is a civil action in which plaintiffs contend that the members of the Lac Courte Oreilles Band of the Lake Superior Tribe of Chippewa Indians have a right, pursuant to the 1837 and 1842 treaties between the Chippewa and the United States, to hunt, fish and gather wild rice without state regulation or control in the area

ceded by the Indians in those treaties. Plaintiffs seek: a declaratory judgment that Wis. Stat. § 29.09(1), which requires hunting, trapping and fishing licenses of all persons, including Indians off reservation lands, is unconstitutional in that it conflicts with the 1837 and 1842 treaties, the Federal Constitution, and a federal law; and an injunction against further enforcement of Wis. Stat. § 29.09 (1) and other state fish and game laws against plaintiffs. Jurisdiction is present. 28 U.S.C. § 1362.

Plaintiffs are the Lac Courte Oreilles Band, suing in behalf of itself and its members; a member of the band who is being prosecuted for exercising his alleged treaty rights; and a member of the Band who is being threatened with prosecution for exercising his alleged treaty rights. Defendants are the Secretary of the Wisconsin Department of Natural Resources who is responsible for the enforcement of state fish and game laws, and state and county officials who are charged with the duty of enforcing and prosecuting state fish and game laws.¹⁸

The case is currently before the court on cross motions for summary judgment. Upon the basis of the entire record herein, I find that there is no genuine issue as to the material facts set forth above, under the heading "Facts," nor the material facts set forth below:

¹⁸In the amended complaint, the individual plaintiffs allege that they are suing on behalf of a class consisting of all members of the Band who are being prosecuted or who are threatened with prosecution "for exercising their hunting, fishing, and trapping rights pursuant to Article 5 of the Treaty of 1837 and Article 2 of the Treaty of 1842." Defendants are also sued as representatives of classes. Although defendants have admitted all of the class allegations of the complaint, a class action has not as yet been certified pursuant to Federal Rules of Civil Procedure 23(c). Because of the broad, equitable nature of the relief sought, I do not think certification of a class is necessary in this litigation. Therefore, I will not address the propriety of class certification at this time.

Facts

The Lac Courte Oreilles Band is a band of Chippewa Indians established in accordance

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with § 16 of the Indian Reorganization Act of 1934, with a governing body recognized by the Secretary of the Interior.

At the time the amended complaint was filed, plaintiff Frederick Tribble, an enrolled member of the Lac Courte Oreilles Band, was being prosecuted for hunting, fishing and ricing activities.

For a number of years, the defendants and their predecessors have been prosecuting members of the Lac Courte Oreilles Band and confiscating their property for violations of Wisconsin fish and game laws committed within the exterior boundaries of the territory ceded by the Treaties of 1837 and 1842, but outside the boundaries of any federally recognized Indian reservation.

At the time the amended complaint was filed, state prosecutions of Melvin White, Thomas Ford and Roger Diamond, all enrolled members of the Lac Courte Oreilles Band, were pending. These prosecutions were for violations of Wisconsin statutes, for activities which plaintiffs claim were within their 1837 and 1842 treaty rights.

OPINION

Plaintiffs contend that when the Chippewa Indians ceded their lands in northern Wisconsin to the United States by treaties in 1837 and 1842, they were granted the right to hunt, fish, trap and gather wild rice and maple sap (hereinafter collectively referred to, for brevity's sake, as hunting rights) on those lands. They contend that those rights have never been abrogated and continue

in effect today. Plaintiffs further allege that pursuant to the provisions of 18 U.S.C. § 1162(b), the State cannot interfere with their treaty hunting rights by regulating those activities or requiring plaintiffs to have licenses to engage in them. Section 1162 gives the states jurisdiction over certain offenses committed in Indian country, but subsection (b) specifically exempts treaty hunting rights:

(b) Nothing in this section shall . . . deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

No issue exists as to the Indians' right today to hunt off the reservation on the same basis on which non-Indians are permitted to hunt. In the ensuing discussion, references to the Indians' "hunting rights," and similar wording, are to be read as references to a special right to hunt free of the restrictions placed upon others by state law.

Defendants concede that the Chippewa were given hunting rights by the treaties of 1837 and 1842. They further concede that if those rights have not been abrogated, the State lacks any authority over Indian hunting activities. But defendants contend that the Indians' treaty hunting rights were extinguished by the President's 1850 order of removal and by the 1854 treaty between the Chippewa and the United States. The single issue to be determined on this motion for summary judgment, therefore, is whether the Indians' 1837 and 1842 treaty hunting rights have been abrogated.

Article 5 of the 1837 treaty between the Chippewa and the United States guaranteed the Indians "[t]he privilege of hunting, fishing and gathering wild rice," on ceded lands. Article 2 of the 1842 treaty between the

Chippewa and the United States guaranteed the Indians "the right of hunting on the ceded territory, with the other usual privileges of occupancy." While the words of the treaties are different, they have both been construed, correctly I think, to grant the Indians the right to live on the ceded lands as they had lived before the treaties were signed. That way of life included hunting, fishing, trapping and gathering wild rice and maple sap as a means of providing food for themselves (to all of which activities I will continue to refer as "hunting"), in addition to having a place of residence. *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

Thus, the disputed hunting rights at issue in this case are based upon the same treaty language as the right of permissive occupation at issue in *United States v. Ben Ruby*, *supra*. for the reasons I have set forth in

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Ben Ruby, I hold that the President's removal order of 1850 was not authorized by either the treaty of 1837 or the treaty of 1842; and that the removal order was thus beyond the scope of the President's powers and without legal effect. Additionally, as I held in *Ben Ruby*, any forcible removal of the Chippewa which may have taken place pursuant to that order is also without legal effect.

[33] Also, I have held in *Ben Ruby* that the Indians' right of permissive occupation promised by the 1837 and 1842 treaties was extinguished by the provisions of the 1854 treaty as to lands outside the reservations, when the boundaries of the reservation were finally determined. It would not be entirely unreasonable to treat the concept of "permissive occupation" as embodying two distinct elements: the right to establish permanent homes in the area; and the right to hunt in the area. It would be open to argument that the 1854 treaty abrogated the former but

not the latter. But I conclude that such a distinction is not valid.

As I pointed out in *Ben Ruby*, the 1854 treaty was a compromise of a vigorous dispute between the United States and the Chippewa about the Indians' rights on the ceded lands. The United States wanted to prepare the way for white settlement, and the Indians understood that purpose. The Indians wanted to remain permanently on lands in the vicinity of the lands where they then resided, and they were willing to accept relatively small reservations in exchange for that right. Chief Buffalo's statement at the treaty negotiations that the Indians now understood that the "whole" of their non-reservation lands would go to the United States indicates the Indian understanding that they were relinquishing any general claims they might have had to lands outside their reservation.

Additionally, as I also pointed out in *Ben Ruby*, Article 11 of the 1854 treaty expressly reserved the right of the Chippewa residing in a Minnesota territory to hunt and fish; and in the 1837 and 1842 treaties the parties had expressly preserved the Indians' hunting rights in the territories then ceded. Had the parties intended the 1854 treaty to continue to preserve those rights in the lands ceded in 1837 and 1842, it is reasonable to believe that they would have made it explicit in 1854.

Finally, this interpretation of the treaty is supported by *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 62 S.Ct. 248, 86 L.Ed. 260 (1941) in which the court held that an Indian tribe's acceptance of a reservation, after years of tension between Indians and white settlers and after numerous attempts by the federal government to solve the problem by establishing a reservation, must be construed as Indian relinquishment of all tribal rights in non-reservation lands.

The evidence indicates that the Indians continued to roam throughout northern Wisconsin and parts of Minnesota in pursuit of food after the 1854 treaty, until the 1890's. I take judicial notice that most of the lands in northern Wisconsin were sparsely populated and publicly owned in 1854, and were only gradually populated and developed during the next half-century. Hunting and fishing on public and undeveloped land was part of the frontier way of life for Indians and white people alike. Thus, the Indians' practice of roaming on non-reservation lands is not persuasive evidence that they were exercising special treaty hunting rights.

I am aware of *People v. Jondreau*, 384 Mich. 539, 185 N.W.2d 375 (1971), construing Article 11 of the 1854 treaty as a grant to the L'Anse band of Chippewa in northern Michigan of the right to fish in a bay of Lake Superior adjacent to their reservation. The court based its holding on the apparent assumption that the territory "hereby ceded" by the 1854 treaty included the area held by the Chippewa in northern Michigan. The evidence in this case in this court clearly shows that only lands in Minnesota were ceded in 1854.

I am also aware of *State v. Gurnoe*, 53 Wis.2d 390, 192 N.W.2d 892 (1972), in which the Court held that the 1854 treaty granted the Chippewa the right to fish in Lake Superior. In *Gurnoe*, Indians, who were members of the Red Cliff and Bad River

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Bands and who had been arrested in Lake Superior waters adjacent to their reservations, challenged the validity of enforcing state fishing regulations against them. They argued that Article 2 of the 1854 treaty, setting aside their reservations on the shore of Lake Superior "for the use of" the bands was a grant of fishing rights in Lake Superior.

The court first examined the 1854 treaty to determine whether, in the phrase "for the use of," the parties had intended generally to exclude all fishing rights. Turning to the history of the tribe and the negotiations of the parties, it found that the Chippewa had a long, uninterrupted history of fishing in Lake Superior, that that right was extremely valuable to the Indians, and that they had continued to fish in the lake after the treaty was negotiated. It concluded that there was "no doubt but that it was the intention of the parties to the treaty for the Chippewa to retain fishing rights within the 1854 agreement." *Id.* at 405, 192 N.W.2d at 899.

Secondly, the court considered whether the fishing rights granted in 1854 extended beyond reservation boundaries to Lake Superior. The court again emphasized the importance of Lake Superior fishing to the Chippewa and concluded: "We find no valid distinction and none is asserted for holding that the Indians may fish in reservation waters but not on the waters of Lake Superior, their traditional fishing ground." *Id.* at 408, 192 N.W.2d at 901. In reaching that conclusion the *Gurnoe* court again looked to the intent of the treating parties, finding, as the court had in *Jondreau*, that the Indians "'would assume that the right to fish meant the right to fish [in Lake Superior].'" *Id.* 384 Mich. at 409, 192 N.W.2d at 901. Additionally, the court relied upon the holding in *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 39 S.Ct. 40, 63 L.Ed. 138 (1918) that a reservation consisting of certain islands included adjacent fishing grounds. In *Alaska Pacific Fisheries*, the court had held that the use of the adjacent fishing grounds was essential to the Indians' sustenance, and that the Indians had proceeded on the theory that the fishing grounds were part of the island when they solicited that location for a reservation. In *Gurnoe*, the court found that the same circumstances were present. The court concluded:

Whether the right to fish in Lake Superior is denominated "off-reservation rights" or inter-

puted to be inherent rights under the treaty, the result is the same—the Chippewa are entitled to the right to fish Lake Superior.

I do not disagree with the result in *Gurnoe*. But although the *Gurnoe* holding is based upon the same treaty and raises an issue which initially appears similar to the issue raised in the present case, the cases are quite distinct.

I must decide, as the court did in *Gurnoe*, what the intentions of the treating parties were about the rights asserted. As the court explained in *Gurnoe*, there is considerable reason to believe that the parties intended that the Chippewa Bands whose reservations bordered on Lake Superior would have fishing rights in Lake Superior. Besides the Indians' long history of fishing in Lake Superior, the evidence in this case in this court indicates that several reservations were located upon the shore of Lake Superior precisely for the purpose of giving the Indians access to the lake for fishing. When a reservation is established "for the use of" an Indian Band and it is located so as to give that Band access to a specific adjacent resource, it is logical and reasonable to infer that the parties intended to make the use of the adjacent off-reservation resource a part of the Indians' treaty rights.

In the present case, the Indians are not claiming a right to fish in a particular body of water adjacent to their reservation, or to hunt and gather maple sap in a forest bordering on their reservation. If they had made such a claim, showing some evidence that the reservation was located so as to give them access to a particular body of water or to a particular forest, *Gurnoe* would be apposite.

Here the Indians claim a more general hunting right to vast areas of land, and they base the claim not upon the 1854 treaty but upon the 1837 and 1842 treaties,

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which, they assert, have not been abrogated. Thus, their claim is not based upon an inference from the language in the 1854 treaty reserving relatively small tracts "for the use of" the Indian Bands.

Had such a claim been asserted in this case, it could not have prevailed. The inference which was reasonable in *Gurnoe* with respect to Lake Superior, and which conceivably might be reasonable with respect to some specific body of water or forest adjacent to the Lac Courte Oreilles reservation, is not appropriate to a claim to special hunting rights throughout the entire territory ceded in 1837 and 1842. To the contrary, as I have explained in *Ben Ruby* and reiterated briefly in this opinion, the evidence strongly implies the parties' intention that the 1854 treaty would extinguish the general Indian claim of a right to occupy, and hunt, fish and otherwise obtain food on the earlier ceded lands. That general intention is not inconsistent with the specific intention the *Gurnoe* court inferred from the 1854 treaty to allow Indians special hunting and fishing rights on certain limited parts of the ceded territory adjacent to their reservations when it appears that the reservations were located so as to give the Indians access to the adjacent resource. Therefore my holding is not inconsistent with the result in *Gurnoe*.¹⁹

¹⁹Although the defendants in *Gurnoe* were members of the Red Cliff and Bad River Bands and lived on reservations bordering on Lake Superior, the court did not limit its holding to the members of those Bands, but held generally that the Chippewa have a right to fish Lake Superior. The Lac Courte Oreilles reservation is about 50 miles inland. But there is no contention here that the defendants threaten to interfere with fishing by the Lac Courte Oreilles Band in Lake Superior, and thus no basis for injunctive relief in that respect. I find it unnecessary to explore the existence or nature of the Lac Courte Oreilles Indians' right to fish in Lake Superior pursuant to the *Gurnoe* decision.

Accordingly, I hold that when the boundaries of the Lac Courte Oreilles reservation were finally determined pursuant to the 1854 treaty, the general right of the Lac Courte Oreilles Band and its individual members to hunt, fish and gather wild rice and maple sap in the area ceded by the Chippewa to the United States by the treaties of 1837 and 1842, free of regulation by state government, was extinguished, except as to reservation lands, and except as to special hunting and fishing rights on limited parts of the ceded territory adjacent to the treaty reservations which might properly be inferred from the language of the 1854 treaty setting apart the reservations "for the use of" the Chippewa.

Because the plaintiffs have made no claims to any such particularized treaty hunting rights, but have argued only that the more general right granted by the 1837 and 1842 treaties had not been abrogated, their contention in this lawsuit must fail.

APPENDIX A

This Appendix A consists of two maps which appear in the Eighteenth Annual Report of the Bureau of American Ethnology to the Secretary of the Smithsonian Institution, 1896-97, by J. W. Powell, Director, Part 2, Plate CXL, No. 33 in List of Maps, and Plate CLXXI, No. 64 in List of Maps (House of Representatives, 56th Congress, 1st Session, Document No. 736, Washington, Government Printing Office, 1899).

Lines have been added to the maps to show the boundaries of the territories ceded by the Treaties of 1837, 1842 and 1854.

APPENDIX A—Continued

Cite as 484 F.Supp. 1316 (1980)
APPENDIX A—Continued

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APPENDIX B

This Appendix B consists of the Treaties of 1837, 1842, and 1854. The Treaty of 1837 is to be found in 7 United States Statutes at Large (Indian Treaties) 536. The Treaty of 1842 is to be found in 7 United States Statutes at Large (Indian Treaties) 591. The Treaty of 1854 is to be found in 10 United States Statutes at Large, 1109.

ARTICLES OF A TREATY

July 29, 1837. Proclamation, June 15, 1838.

Made and concluded at St. Peters (the confluence of the St. Peters and Mississippi rivers) in the Territory of Wisconsin, between the United States of America, by their commissioner, Henry Dodge, Governor of said Territory, and the Chippewa nation of Indians, by their chiefs and headmen.

Land ceded to the U.S.

ARTICLE 1. The said Chippewa nation cede to the United States all that tract of country included within the following boundaries:

Boundaries

Beginning at the junction of the Crow Wing and Mississippi rivers, between twenty and thirty miles above where the Mississippi is crossed by the forty-sixth parallel of north latitude, and running thence to the north point of Lake St. Croix, one of the sources of the St. Croix river; thence to and along the dividing ridge between the waters of Lake Superior and those of the Mississippi, to the sources of the Ocha-sua-sepe a tributary of the Chippewa river; thence to a point on the Chippewa river, twenty miles below the outlet of Lake De Flambeau; thence to the junction of the Wisconsin and Pelican

rivers; thence on an east course twenty-five miles; thence southerly, on a course parallel with that of the Wisconsin river, to the line dividing the territories of the Chippewas and Menomonies; thence to the Plover Portage; thence along the southern boundary of the Chippewa country, to the commencement of the boundary line dividing it from that of the Sioux, half a days march below the falls on the Chippewa river; thence with said boundary line to the mouth of Wah-tap river, at its junction with the Mississippi; and thence up the Mississippi to the place of beginning.

U.S. to make the following payments annually for twenty years.

ARTICLE 2. In consideration of the cession aforesaid, the United States agree to make to the Chippewa nation, annually, for the term of twenty years, from the date of the ratification of this treaty, the following payments.

1. Nine thousand five hundred dollars, to be paid in money.
2. Nineteen thousand dollars, to be delivered in goods.
3. Three thousand dollars for establishing three blacksmiths shops, supporting the blacksmiths, and furnishing them with iron and steel.
4. One thousand dollars for farmers, and for supplying them and the Indians, with implements of labor, with grain or seed; and whatever else may be necessary to enable them to carry on their agricultural pursuits.
5. Two thousand dollars in provisions.
6. Five hundred dollars in tobacco.

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The provisions and tobacco to be delivered at the same time with the goods, and the money to be paid; which time or times, as well as the place or places where they are to be delivered, shall be fixed upon under the direction of the President of the United States.

The blacksmiths shops to be placed at such points in the Chippewa country as shall be designated by the Superintendent of Indian Affairs, or under his direction.

If at the expiration of one or more years the Indians should prefer to receive goods, instead of the nine thousand dollars agreed to be paid to them in money, they shall be at liberty to do so. Or, should they conclude to appropriate a portion of that annuity to the establishment and support of a school or schools among them, this shall be granted them.

Payment to half-breeds.

ARTICLE 3. The sum of one hundred thousand dollars shall be paid by the United States, to the half-breeds of the Chippewa nation, under the direction of the President. It is the wish of the Indians that their two sub-agents Daniel P. Bushnell, and Miles M. Vineyard, superintend the distribution of this money among their half-breed relations.

Payment of claims against Indians.

ARTICLE 4. The sum of seventy thousand dollars shall be applied to the payment, by the United States, of certain claims against the Indians; of which amount twenty-eight thousand dollars shall, at their request, be paid to William A. Aitkin, twenty-five thousand to Lyman M. Warren, and the ballance applied to the liquidation of other just demands against them—which they acknowledge to be the case with regard to that presented by Hercules L. Dousman, for the sum of five thousand dollars; and they request that it be paid.

Hunting ground.

ARTICLE 5. The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States.

Treaty binding when ratified.

ARTICLE 6. This treaty shall be obligatory from and after its ratification by the President and Senate of the United States.

Done at St. Peters in the Territory of Wisconsin the twenty-ninth day of July eighteen hundred and thirty-seven.

(Signed) *HENRY DODGE, Com'r.*

From Leech lake.

Chiefs.

Aish-ke-bo-ge-koshe, or Flat Mouth,
R-che-o-sau-ya, or the Elder Brother.

Warriors.

Pe-zhe-kins, the Young Buffalo,
Ma-ghe-ga-bo, or La Trappe,
O-be-gwa-dans, the Chief of the Earth,
Wa-bose, or the Rabbit,
Che-a-na-quod, or the Big Cloud.

From Gull lake and Swan river.

Chiefs.

Pa-goo-na-kee-zhig, or the Hole in the Day,
Songa-ko-mig, or the Strong Ground.

Warriors.

Wa-boo-jig, or the White Fisher,
Ma-cou-da, or the Bear's Heart.

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APPENDIX B—Continued

From St. Croix river.

Chiefs.

Pe-zhe-ke, or the Buffalo,
Ka-be-ma-be, or the Wet Month.

Warriors.

Pa-ga-we-we-wetung, Coming Home Hollowing,
Ya-banse, or the Young Buck,
Kis-ke-ta-wak, or the Cut Ear.

From Lake Courteville.

Chiefs.

Pa-qua-a-mo, or the Wood Pecker.

From Lac De Flambeau.

Chiefs.

Pish-ka-ga-ghe, or the White Crow,
Na-wa-ge-wa, or the Knee,
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O-ge-ma-ga, or the Dandy,
Pa-se-quam-jis, or the Commissioner,
Wa-be-ne-me, or the White Thunder.

From La Pointe, (on Lake Superior.)

Chiefs.

Pe-zhe-ke, or the Buffalo,
Ta-qua-ga-na, or Two Lodges Meeting,
Cha-che-que-o.

From Mille Lac.

Chiefs.

Wa-shask-ko-kone, or Rats Liver.
Wen-ghe-ge-she-guk, or the First Day.

Warriors.

Ada-we-ge-shik, or Both Ends of the Sky,
Ka-ka-quap, or the Sparrow.

From Sandy Lake.

Chiefs.

Ka-nan-da-wa-win-zo, or Le Brocheux,
We-we-shan-shis, the Bad Boy, or Big Mouth,
Ke-che-wa-me-te-go, or the Big Frenchman

Warriors.

Na-ta-me-ga-bo, the Man that stands First,
Sa-ga-ta-gun, or Spunk.

From Snake river.

Chiefs.

Naudin, or the Wind,
Sha-go-bai, or the Little Six,
Pay-a-jik, or the Lone Man,
Na-qua-na-bie, or the Feather.

Warriors.

Ha-tau-wa,
Wa-me-te-go-zhins, the Little Frenchman,
Sho-ne-a, or Silver.

From Fond du Lac, (on Lake Superior.)

Chiefs.

Mang-go-sit, or the Loons Foot,
Shing-go-be, or the Spruce.

From Red Cedar Lake.

Mont-so-mo, or the Murdering Yell

From Red Lake.

Francois Goumean (a half breed.)

*From Leech Lake.**Warriors.*

Sha-wa-ghe-zhig, or the Sounding Sky,
 Wa-zau-ko-ni-a, or Yellow Robe.

Signed in presence of Verplanck Van Antwerp, Sec'y. to the Commissioner. M. M. Vineyard, U. S. Sub-Ind. Agt. Daniel P. Bushnell. Law. Taliaferro, Ind. Agent at St. Peters. Martin Scott, Capt. 5th Reg't. Inf'ty. J. Emerson, Ass't. Surg. U. S. Army. H. H. Sibley. H. L. Dousman. S. C. Stambaugh. E. Lockwood. Lyman M. Warren. J. N. Nicollet. Harmen Van Antwerp. Wm. H. Forbes. Jean Baptiste Dubay, Interpreter. Peter Quinn, Interpreter. S. Campbell, U. S. Interpreter. Stephen Bonga, Interpreter. Wm. W. Coriell.

To the Indian names are subjoined a mark and seal.

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ARTICLES OF A TREATY

Oct. 4, 1842. Proclamation, March 23, 1843.

Made and concluded at La Pointe of Lake Superior, in the Territory of Wisconsin, between Robert Stuart commissioner on the part of the United States, and the Chippewa Indians of the Mississippi, and Lake Superior, by their chiefs and headmen.

ARTICLE I.

Land ceded to the U.S.

The Chippewa Indians of the Mississippi and Lake Superior, cede to the United States all the country within the following boundaries; viz: beginning at the mouth of Chocolate river of Lake Superior; thence northwardly across said lake to intersect the boundary line between the United States and the Province of Canada; thence up said Lake Superior, to the mouth of the St. Louis, or Fond

du Lac river (including all the islands in said lake); thence up said river to the American Fur Company's trading post, at the southwardly bend thereof, about 22 miles from its mouth; thence south to intersect the line of the treaty of 29th July 1837, with the Chippewas of the Mississippi; thence along said line to its southeastwardly extremity, near the Plover portage on the Wisconsin river; thence northeastwardly, along the boundary line, between the Chippewas and Menomonees, to its eastern termination, (established by the treaty held with the Chippewas, Menomonees, and Winnebagoes, at Butte des Morts, August 11th 1827) on the Skonawby river of Green Bay; thence northwardly to the source of Chocolate river; thence down said river to its mouth, the place of beginning; it being the intention of the parties to this treaty, to include in this cession, all the Chippewa lands eastwardly of the aforesaid line running from the American Fur Company's trading post on the Fond du Lac river to the intersection of the line of the treaty made with the Chippewas of the Mississippi July 29th 1837.

ARTICLE II.

Hunting ground.

The Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States, and that the laws of the United States shall be continued in force, in respect to their trade and intercourse with the whites, until otherwise ordered by Congress.

ARTICLE III.

Unceded lands to be common property of the Indians.

It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands, shall

be the common property and home of all the Indians, party to this treaty.

ARTICLE IV.

Sums to be paid by U.S. for cession.

In consideration of the foregoing cession, the United States, engage to pay to the Chippewa Indians of the Mississippi, and Lake Superior, annually, for twenty-five years, twelve thousand five hundred (12,500) dollars, in specie, ten thousand five hundred (10,500) dollars in goods, two thousand (2,000) dollars in provisions and tobacco, two thousand (2,000) dollars for the support of two blacksmiths shops, (including pay

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APPENDIX B—Continued

of smiths and assistants, and iron steel &c.) one thousand (1,000) dollars for pay of two farmers, twelve hundred (1,200) for pay of two carpenters, and two thousand (2,000) dollars for the support of schools for the Indians party to this treaty; and further the United States engage to pay the sum of five thousand (5,000) dollars as an agricultural fund, to be expended under the direction of the Secretary of War. And also the sum of seventy-five thousand (75,000) dollars, shall be allowed for the full satisfaction of their debts within the ceded district, which shall be examined by the commissioner to this treaty, and the amount to be allowed decided upon by him, which shall appear in a schedule hereunto annexed. The United States shall pay the amount so allowed within three years.

Provision for half-breeds.

Whereas the Indians have expressed a strong desire to have some provision made for their half breed relatives, therefore it is agreed, that fifteen thousand (15,000)

dollars shall be paid to said Indians, next year, as a present, to be disposed of, as they, together with their agent, shall determine in council.

ARTICLE V.

Division of annuity.

Whereas the whole country between Lake Superior and the Mississippi, has always been understood as belonging in common to the Chippewas, party to this treaty; and whereas the bands bordering on Lake Superior, have not been allowed to participate in the annuity payments of the treaty made with the Chippewas of the Mississippi, at St. Peters July 29th 1837, and whereas all the unceded lands belonging to the aforesaid Indians, are hereafter to be held in common, therefore, to remove all occasion for jealousy and discontent, it is agreed that all the annuity due by the said treaty, as also the annuity due by the present treaty, shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share.

ARTICLE VI.

Indians on mineral districts subject to removal.

The Indians residing on the Mineral district, shall be subject to removal therefrom at the pleasure of the President of the United States

ARTICLE VII.

Obligatory when ratified.

This treaty shall be obligatory upon the contracting parties, when ratified by the President and Senate of the United States.

In testimony whereof, the said Robert Stuart commissioner, on the part of the United States, and the chiefs and headmen of the Chippewa Indians of the Mississippi

and Lake Superior, have hereunto set their hands, at La Pointe of Lake Superior, Wisconsin Territory this fourth day of October in the year of our Lord one thousand eight hundred and forty-two.

ROBERT STUART, *Commissioner.*

JNO. HULBERT, *Secretary.*

[464 F.Supp 1369]

APPENDIX B — Continued

Crow-wing River,	Po go ne gi shik,	1st chief,
Do.	Son go com ick,	2d do.
Sandy Lake,	Ka non do ur uin zo,	1st do.
Do.	Na tum e gaw bon,	2d do.
Gull Lake,	Ua bo jig,	1st do.
Do.	Pay pe si gon de bay,	2d do.
Red Ceder Lake,	Kui ui sen shia,	1st do.
Do.	Ott taw wance,	2d do.
Po ke gom maw,	Bai ie jig,	1st do.
Do.	Show ne aw,	2d do.
Wisconsin River,	Ki uen zi,	1st do.
Do.	Wi aw bis ke kut te way	2d do.
Lac de Flambeau,	A pish ka go gi,	1st do.
Do.	May tock cus e quay,	2d do.
Do.	She maw gon e,	2d do.
Lake Bands	Ki ji ua be she shi,	1st do.
Do.	Ke kon o tum,	2d do.
Fond du Lac,	Shin goob,	1st do.
Do.	Na gan nab,	2d do.
Do.	Mong o zet,	2d do.
La Pointe,	Gitchi waisky,	1st do.
Do.	Mi zi,	2d do.
Do.	Ta qua gone e,	2d do.
Onlonagan,	O kon di kan,	1st do.
Do.	Kis ke taw wac,	2d do.
Ance,	Pe na shi,	1st do.
Do.	Guck we san sish,	2d do.

Vieux Desert,	Ka she osh e,	1st do.
Do.	Medge waw gwaw wot,	2d do.
Mille Lac,	Ne qua ne be,	1st do.
Do.	Ua shash ko kum,	2d do.
Do.	No din,	2d do.
St. Croix,	Be zhi ki,	1st do.
Do.	Ka bi na be,	2d do.
Do.	Ai aw bens,	2d do.
Snake River,	Sha go bi,	1st do.
Chippewa River,	Ua be she shi,	1st do.
	Que way zban sis,	2d do.
Lac Courtulle,	Nena nang eb,	1st do.
Do.	Be bo kon uen,	2d do.
Do.	Ki eun zi,	2d do.

In presence of Henry Blatchford, Interpreter. Samuel Ashmun, Interpreter. Justin Rice. Charles H. Oakes. William A. Aitkin. William Brewster. Charles M. Borup. Z. Platt. C. H. Beaulieu. L. T. Jamison. James P. Scott. Cyrus Mendenhall. L. M. Warren.

To the Indian names are subjoined marks.

[464 F.Supp.1370]

APPENDIX B—Continued

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

TO ALL AND SINGULAR TO WHOM THESE
PRESENTS SHALL COME, GREETING:

Sept. 30, 1854.

WHEREAS a treaty was made and concluded at La Pointe, in the State of Wisconsin, on the thirtieth day of September, eighteen hundred and fifty-four, by Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of

Lake Superior and the Mississippi, by their chiefs and headmen, which treaty is in the words following, to wit:—

Articles of a treaty made and concluded at La Pointe, in the State of Wisconsin, between Henry C. Gilbert and David B. Herriman, commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, by their chiefs and headmen.

Cession to the United States by Chippewas of Lake Superior.

ARTICLE 1. The Chippewas of Lake Superior hereby cede to the United States, all the lands heretofore owned by them in common with the Chippewas of the Mississippi, lying east of the following boundary line, to wit: Beginning at a point, where the east branch of Snake River crosses the southern boundary line of the Chippewa country, running thence up the said branch to its source, thence nearly north, in a straight line, to the mouth of East Savannah River, thence up the St. Louis River to the mouth of East Swan River, thence up the East Swan River to its source, thence in a straight line to the most westerly bend of Vermillion River, and thence down the Vermillion River to its mouth.

Relinquishment to Chippewas of Mississippi by Chippewas of Lake Superior.

The Chippewas of the Mississippi hereby assent and agree to the foregoing cession, and consent that the whole amount of the consideration money for the country ceded above, shall be paid to the Chippewas of Lake Superior, and in consideration thereof the Chippewas of Lake Superior hereby relinquish to the Chippewas of the Mississippi, all their interest in and claim to the lands heretofore owned by them in common, lying west of the above boundary line.

Reservation for Chippewas of Lake Superior.

ARTICLE 2. The United States agree to set apart and withhold from sale, for the use of the Chippewas of Lake Superior, the following described tracts of land, viz:—

1st. For the L'Anse and Vieux De Sert bands, all the unsold lands in the following townships in the State of Michigan: Township fifty one north range thirty-three west; township fifty-one north range thirty-two west; the east half of township fifty north range thirty-three west; the west half of township fifty north range thirty-two west, and all of township fifty-one north range thirty-one west, lying west of Huron Bay.

2d. For the La Pointe band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the centre

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APPENDIX B—Continued

of township forty-seven north, thence west to the west line of said township, thence south to the southeast corner of township forty-six north, range thirty-two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore, and thence along the lake shore, crossing Shag-waw-me-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground.

3d. For the other Wisconsin bands, a tract of land lying about Lac De Flambeau, and another tract on Lac Court Orielles, each equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President.

4th. For the Fond Du Lac bands, a tract of land bounded as follows: Beginning at an island in the St. Louis River, above Knife Portage, called by the Indians Paw-paw-sco-me-me-tig, running thence west to the boundary line heretofore described, thence north along said boundary line to the mouth of Savannah River, thence down the St. Louis River, to the place of beginning. And if said tract shall contain less than one hundred thousand acres, a strip of land shall be added on the south side thereof, large enough to equal such deficiency.

5th. For the Grand Portage band, a tract of land bounded as follows: Beginning at a rock, a little east of the eastern extremity of Grand Portage Bay, running thence along the lake shore to the mouth of a small stream called by the Indians Maw-ske-gwaw-caw-maw-se-be, or Cranberry Marsh River, thence up said stream, across the point to Pigeon River, thence down Pigeon River to a point opposite the starting point, and thence across to the place of beginning.

6th. The Ontonagon band and that subdivision of the La Pointe band of which Buffalo is chief, may each select on or near the lake shore, four sections of land, under the direction of the President, the boundaries of which shall be defined hereafter. And being desirous to provide for some of his connections who have rendered his people important services, it is agreed that the chief Buffalo may select one section of land, at such place in the ceded territory as he may see fit, which shall be reserved for that purpose, and conveyed by the United States to such person or persons as he may direct.

7th. Each head of a family or single person over twenty-one years of age at the present time of the mixed bloods, belonging to the Chippewas of Lake Superior, shall be entitled to eighty acres of land, to be selected by them under the direction of the President, and which shall be secured to them by patent in the usual form.

Survey and patents of reservation.

ARTICLE 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such

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APPENDIX B—Continued

occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases.

Payments for said cession.

ARTICLE 4. In consideration of and payment for the country hereby ceded, the United States agrees to pay to the Chippewas of Lake Superior, annually, for the term of twenty years, the following sums, to wit: five thousand dollars in coin; eight thousand dollars in goods, household furniture and cooking utensils; three thousand dollars in

agricultural implements and cattle, carpenter's and other tools and building materials, and three thousand dollars for moral and educational purposes, of which last sum, three hundred dollars per annum shall be paid to the Grand Portage band, to enable them to maintain a school at their village. The United States will also pay the further sum of ninety thousand dollars, as the chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of six thousand dollars, in agricultural implements, household furniture, and cooking utensils, to be distributed at the next annuity payment, among the mixed bloods of said nation. The United States will also furnish two hundred guns, one hundred rifles, five hundred beaver traps, three hundred dollars' worth of ammunition, and one thousand dollars' worth of ready-made clothing, to be distributed among the young men of the nation, at the next annuity payment.

Blacksmiths and assistants.

ARTICLE 5. The United States will also furnish a blacksmith and assistant, with the usual amount of stock, during the continuance of the annuity payments, and as much longer as the President may think proper, at each of the points herein set apart for the residence of the Indians, the same to be in lieu of all the employees to which the Chippewas of Lake Superior may be entitled under previous existing treaties.

Annuities not to be withheld for debts, but may be for depredations.

ARTICLE 6. The annuities of the Indians shall not be taken to pay the debts of individuals, but satisfaction for depredations committed by them shall be made by them in such a manner as the President may direct.

Spirituous liquors.

ARTICLE 7. No spirituous liquors shall be made, sold, or used on any of the lands herein set apart for the

residence of the Indians, and the sale of the same shall be prohibited in the territory hereby ceded, until otherwise ordered by the President.

Division between Chippewas of Mississippi and of Lake Superior of benefits of former treaties.

ARTICLE 8. It is agreed, between the Chippewas of Lake Superior and the Chippewas of the Mississippi, that the former shall be entitled to two thirds, and the latter to one third, of all benefits to be derived from former treaties existing prior to the year 1847.

Arrearages.

ARTICLE 9. The United States agree that an examination shall be made, and all sums that may be found equitably due to the Indians, for

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APPENDIX B—Continued

arreareages of annuity or other thing, under the provisions of former treaties, shall be paid as the chiefs may direct.

Preemption.

ARTICLE 10. All missionaries, and teachers, and other persons of full age, residing in the territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed to the amount of one quarter section each.

Annuities, how paid.

ARTICLE 11. All annuity payments to the Chippewas of Lake Superior, shall hereafter be made at L'Anse, La Pointe, Grand Portage, and on the St. Louis River; and the Indians shall not be required to remove

from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.

Stipulations for Bois Forte Indians.

ARTICLE 12. In consideration of the poverty of the Bois Forte Indians who are parties to this treaty, they having never received any annuity payments, and of the great extent of that part of the ceded country owned exclusively by them, the following additional stipulations are made for their benefit. The United States will pay the sum of ten thousand dollars, as their chiefs in open council may direct, to enable them to meet their present just engagements. Also the further sum of ten thousand dollars, in five equal annual payments, in blankets, cloth, nets, guns, ammunition, and such other articles of necessity as they may require.

They shall have the right to select their reservation at any time hereafter, under the direction of the President; and the same may be equal in extent, in proportion to their numbers, to those allowed the other bands, and be subject to the same provisions.

They shall be allowed a blacksmith, and the usual smith-shop supplies, and also two persons to instruct them in farming, whenever in the opinion of the President it shall be proper, and for such length of time as he shall direct.

It is understood, that all Indians who are parties to this treaty, except the Chippewas of the Mississippi, shall hereafter be known as the Chippewas of Lake Superior. Provided, that the stipulation by which the Chippewas of Lake Superior relinquishing their right to land west of the boundary line, shall not apply to the Bois Forte band who are parties to this treaty.

ARTICLE 13. This treaty shall be obligatory on the contracting parties, as soon as the same shall be ratified by the President and Senate of the United States.

In testimony whereof, the said Henry C. Gilbert, and the said David B. Herriman, commissioners as aforesaid, and the undersigned chiefs and headmen of the Chippewas of Lake Superior and the Mississippi, have hereunto set their hands and seals, at the place aforesaid, this thirtieth day of September, one thousand eight hundred and fifty-four.

HENRY C. GILBERT,
DAVID B. HERRIMAN,
Commissioners.

Richard M. Smith,
Secretary.

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APPENDIX B — Continued

La Pointe Band

KE—CHE—WAISH—KE, or the Buffalo, 1st chief,	his x mark [L. S.]
CHAY—CHE—QUE—OH, 2d chief,	his x mark [L. S.]
A—DAW—WE—GE—ZHICK, or Each Side of the sky, 2d chief,	his x mark [L. S.]
O—SKE—NAW—WAY, or the Youth, 2d chief,	his x mark [L. S.]
MAW—CAW—DAY—PE—NAY—SE, or the Black Bird, 2d chief,	his x mark [L. S.]
NAW—WAW—NAW—QUOT, headman,	his x mark [L. S.]
KE—WAIN—ZEENCE, headman,	his x mark [L. S.]
WAW—BAW—NE—ME—KE, or the White Thunder, 2d chief,	his x mark [L. S.]

PAY—BAW—ME—SAY, or the Soarer,	
2d chief,	his x mark [L. S.]
NAW—WAW—GE—WAW—NOSE,	
or the Little Current, 2d chief,	his x mark [L. S.]
MAW—CAW—DAY—WAW—QUOT,	
or the Black Cloud, 2d chief,	his x mark [L. S.]
ME—SHE—NAW—WAY,	
or the Disciple, 2d chief	his x mark [L. S.]
KEY—ME—WAW—NAW—UM,	
headman,	his x mark [L. S.]
SHE—GOG, headman,	his x mark [L. S.]

Ontonagon Band.

O—CUN—DE—CUN, or the Buoy,	
1st chief,	his x mark [L. S.]
WAW—SAY—GE—ZHICK,	
or the Clear Sky, 2d chief,	his x mark [L. S.]
KEESH—KE—TAW—WUG,	
headman,	his x mark [L. S.]

L'Anse Band.

DAVID KING, 1st chief,	his x mark [L. S.]
JOHN SOUTHWIND, headman,	his x mark [L. S.]
PETER MARKSMAN, headman,	his x mark [L. S.]
NA—TAW—ME—GE—ZHICK,	
or the First Sky, 2d chief	his x mark [L. S.]
AW—SE—NEECE, headman,	his x mark [L. S.]

Vieux De Sert Band.

MAY—DWAY—AW—SHE,	
1st chief,	his x mark [L. S.]
POSH—QUAY—GEN,	
or the Leather, 2d chief,	his x mark [L. S.]

Grand Portage Band.

SHAW—GAW—NAW—SHEENCE, or the Little Englishman, 1st chief,	his x mark [L. S.]
MAY—MOSH—CAW—WOSH, headman	his x mark [L. S.]
AW—DE—KONSE, or the Little Reindeer, 2d chief,	his x mark [L. S.]
WAY—WE—GE—WAM, headman	his x mark [L. S.]

Fond Du Lac Band.

SHIGN—GOOPE, or the Balsom, 1st chief,	his x mark [L. S.]
MAWN—GO—SIT, or the Loon's Foot, 2d chief,	his x mark [L. S.]

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APPENDIX B — Continued

MAY—QUAW—ME—WE—GE—ZHICK, headman,	his x mark [L. S.]
KEESH—KAWAK, headman,	his x mark [L. S.]
CAW—TAW—WAW—BE—DAY, headman,	his x mark [L. S.]
O—SAW—GEE, headman,	his x mark [L. S.]
KE—CHE—AW—KE—WAIN—ZE, headman,	his x mark [L. S.]
NAW—GAW—NUB, or the Foremost Sitter, 2d chief,	his x mark [L. S.]
AIN—NE—MAW—SUNG, 2d chief,	his x mark [L. S.]
NAW—AW—BUN—WAY, headman,	his x mark [L. S.]
WAIN—GE—MAW—TUB, headman,	his x mark [L. S.]
AW—KE—WAIN—ZEENCE, headman,	his x mark [L. S.]

SHAY—WAY—BE—NAY—SE,	
headman,	his x mark [L. S.]
PAW—PE—OH, headman,	his x mark [L. S.]

Lac Court Oreille Band.

AW—KE—WAIN—ZE,	
or the Old Man, 1st chief,	his x mark [L. S.]
KEY—NO—ZHANCE,	
or the Little Jack Fish, 1st chief,	his x mark [L. S.]
KEY—CHE—PE—NAY—SE,	
or the Big Bird, 2d chief,	his x mark [L. S.]
KE—CHE—WAW—BE—SHAY—SHE,	
or the Big Martin, 2d chief,	his x mark [L. S.]
WAW—BE—SHAY—SHEENCE,	
headman,	his x mark [L. S.]
QUAY—QUAY—CUB, headman,	his x mark [L. S.]
SHAW—WAW—NO—ME—TAY,	
headman,	his x mark [L. S.]
NAY—NAW—ONG—GAY—BE,	
or the Dressing Bird, 1st chief,	his x mark [L. S.]
O—ZHAW—WAW—SCO—GE—ZHICK,	
or the Blue Sky, 2d chief,	his x mark [L. S.]
I—YAW—BANSE,	
or the Little Buck, 2d chief,	his x mark [L. S.]
KE—CHE—E—NIN—NE,	
headman,	his x mark [L. S.]
HAW—DAW—GAW—ME,	
headman,	his x mark [L. S.]
WAY—ME—TE—GO—SHE,	
headman,	his x mark [L. S.]
PAY—ME—GE—WUNG,	
headman,	his x mark [L. S.]

Lac Du Flambeau Band.

AW—MO—SE, or the Wasp,	
1st chief,	his x mark [L. S.]
KE—NISH—TE—NO, 2d chief,	his x mark [L. S.]

ME—GEE—SEE, or the Eagle,	
2d chief,	his x mark [L. S.]
KAY—KAY—CO—GAW—NAY—AW—SHE,	
headman,	his x mark [L. S.]
O—CHE—CHOG, headman,	his x mark [L. S.]
NAY—SHE—KAY—GAW—NAY—BE,	
headman,	his x mark [L. S.]
O—SCAW—BAY—WIS,	
or the Waiter,	
1st chief,	his x mark [L. S.]
QUE—WE—ZANCE,	
or the White Fish, 2d chief,	his x mark [L. S.]
NE—GIG, or the Otter,	
2d chief,	his x mark [L. S.]
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NAY—WAW—CHE—GE—GHICK—MAY—BE,	
headman,	his x mark [L. S.]
QUAY—QUAY—KE—CAH,	
headman,	his x mark [L. S.]

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APPENDIX B — Continued

Bois Forte Band.

KAY—BAISH—CAW—DAW—WAY,	
or Clear Round the Prairie,	
1st chief,	his x mark [L. S.]
WAY—ZAW—WE—GE—ZHICK—WAY—SKING,	
headman,	his x mark [L. S.]
O—SAW—WE—PE—NAY—SHE	
headman,	his x mark [L. S.]

The Mississippi Bands.

QUE—WE—SAN—SE,	
or Hole in the Day, head chief,	his x mark [L. S.]

CAW—NAWN—DAW—WAW—WIN—ZO,	
or the Berry Hunter, 1st chief,	his x mark [L. S.]
WAW—BOW—JIEG,	
or the White Fisher, 2d chief,	his x mark [L. S.]
OT—TAW—WAW, 2d chief,	his x mark [L. S.]
QUE—WE—ZHAN—CIS,	
or the Bad Boy, 2d chief,	his x mark [L. S.]
BYE—A —JICK, or the Lone Man,	
2d chief,	his x mark [L. S.]
I—YAW—SHAW—WAY—GE—ZHICK,	
or the Crossing Sky,	
2d chief,	his x mark [L. S.]
MAW—CAW—DAY,	
or the Bear's Heart, 2d chief,	his x mark [L. S.]
KE—WAY—DE—NO—GO—NAY-BE,	
or the Northern Feather,	
2d chief,	his x mark [L. S.]
ME—SQUAW—DACE, headman,	his x mark [L. S.]
NAW—GAW—NE—GAW—BO,	
headman,	his x mark [L. S.]
WAWM—BE—DE—YEA,	
headman,	his x mark [L. S.]
WAISH—KEY, headman,	his x mark [L. S.]
CAW—WAY—CAW—ME—GE—SKUNG,	
headman,	his x mark [L. S.]
MY—YAW—GE—WAY—WE—DUNK,	
or the One who carries the Voice,	
2d chief,	his x mark [L. S.]

JOHN F. GODFROY,
GEO. JOHNSTON,
S. A. MARVIN,
LOUIS CODOT, *Interpreters*
PAUL H. BEAULIEU,
HENRY BLATCHFORD,
PETER FLOY,

Executed in the presence of

HENRY M. RICE,
J. W. LYNDE,
G. D. WILLIAMS,
B. H. CONNOR,
E. W. MULDOUGH,
RICHARD GODFROY,
D. S. CASH,
H. H. McCULLOUGH,
E. SMITH LEE,
Wm. E. VANTASSEL,
L. H. WHELLER.

Opinion by Judge Pell

JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

January 25, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. PAUL C. WEICK, Senior Circuit Judge*
Hon. WILBUR F. PELL, Circuit Judge

Nos. 78-2398 and 78-2443

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS, et al.,
Plaintiffs-Appellants,
Cross-Appellees,

vs.

LESTER P. VOIGHT, et al.,
Defendants-Appellees,
Cross-Appellants.

No. 79-1014

UNITED STATES OF AMERICA,
Plaintiff-Cross-Appellee,

vs.

STATE OF WISCONSIN, a sovereign state,
and SAWYER COUNTY, Wisconsin,
Defendants-Cross-Appellants.

Appeals from the United States
District Court for the
Western District of Wisconsin.

Nos. 72-C-313 and 72-C-366
Judge James E. Doyle

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED, with costs, and the case REMANDED, with instructions, in accordance with the opinion of this Court filed this date.

*Paul C. Weick, Senior Circuit Judge for the Sixth Circuit, sitting by designation.

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

March 8, 1983

Before

Hon. WALTER J. CUMMINGS, Chief Judge

Hon. WILBUR F. PELL, Jr., Circuit Judge

Hon. PAUL C. WEICK, Senior Circuit Judge*

LAC COURTE OREILLES BAND OF LAKE

SUPERIOR CHIPPEWA INDIANS, et al.,

Plaintiffs-Appellants,

Cross-Appellees,

Nos. 78-2398, 78-2443

vs.

LESTER P. VOIGT, et al.,

Defendants-Appellees,

Cross-Appellants.

No. 79-1014

UNITED STATES OF AMERICA,

Plaintiff-Cross-Appellee,

v.

STATE OF WISCONSIN, a sovereign state and

SAWYER COUNTY, Wisconsin,

Defendants-Cross-Appellants.

Appeals from the

United States District

Court for the Western

District of Wisconsin.

Nos. 72-C-366 and 74-C-313

James E. Doyle, *Judge*

The opinion in the above-captioned case issued by this court on January 25, 1983 should be amended as follows:

1. The caption of case nos. 78-2398 and 78-2443 is hereby amended to reflect that the name of the named defendant-appellee, cross-appellant is "Lester P. Voigt" rather than "Lester P. Voight.

2. Page 3, line 5 — 1942 should read 1842.

3. Page 14, line 11 from bottom — *Nielson* should read *Nielsen*.

4. Page 16, line 17 from bottom — *Tulec v. Washington* should read *Tulee v. Washington*.

Nos. 78-2398, 78-2443, 79-1014

*Paul C. Weick, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

5. At page 24, last paragraph, line 4, the word "with" is amended to read "which." The entire line therefore reads: "*United States v. Winans*, 198 U.S. 371 (1905), on which the"

6. At page 45-46, the last paragraph of the opinion is amended to read as follows:

Having considered all the arguments urged by the parties, the district court's summary judgment in favor of the defendants as to the continued existence of the LCO's usufructuary rights is reversed. The exercise of these rights is limited to those portions of the ceded lands that are not privately owned.¹⁴ The case is remanded to the district judge with instructions to enter judgment for the LCO band on that aspect of the case and for further consideration as to the

permissible scope of State regulation over the LCO's exercise of their usufructuary rights.

7. The following footnote 14 is added to the opinion:

^{14/} This court has understood the LCO band's argument to be limited to those portions of the ceded lands that have not passed into private ownership. To the extent that the LCO band might be claiming a broader right — such as the right to engage in usufructuary activities on land that is privately owned but utilized for sport hunting and fishing — we find that the claim is inconsistent with the Indians' understanding at the time of the cession treaties that their rights could be limited if the land were needed for white settlement, *see* Section I, *supra*.

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by defendants and cross-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH DISTRICT

LAC COURTE OREILLES BAND OF
LAKE SUPERIOR CHIPPEWA INDIANS, ET AL.,
*Plaintiffs-Appellants and
Cross-Appellants*

v. Case Nos. 78-2398 and
LESTER P. VOIGT, ET AL., 78-2443
*Defendants-Appellees and
Cross-Appellants.*

UNITED STATES OF AMERICA,
Plaintiff and Cross-Appellee,

v. Case No. 79-1014
STATE OF WISCONSIN and
SAWYER COUNTY, WISCONSIN,
Defendants and Cross-Appellants.

**NOTICE OF APPEAL
TO THE SUPREME COURT OF
THE UNITED STATES**

Notice is hereby given that Lester P. Voigt and others, the defendants-appellees and cross-appellants above named, and the State of Wisconsin and Sawyer County, Wisconsin, the defendants-cross-appellants above named, hereby appeal to the Supreme Court of the United States from the judgment entered in this action on January 25, 1983.

This appeal is taken pursuant to 28 U.S.C. sec. 1254(2).
Dated this 27th day of April, 1983.

BRONSON C. LA FOLLETTE
Attorney General

/s/ Mary V. Bowman
MARY V. BOWMAN
Assistant Attorney General

Attorneys for Defendants-Appellees
and Cross-Appellants.

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-0284

CERTIFICATE OF MAILING

I hereby certify that, on April 27, 1983, I mailed one copy of the enclosed Notice of Appeal to the Supreme Court of the United States to counsel for the plaintiffs-appellants and plaintiff-cross-appellant, by first class mail, with adequate postage attached, to:

Albert M. Ferlo, Jr.
Attorney at Law
Department of Justice
Washington, D.C. 20530

Kathryn Tierney
Route 2 Box 421
Hayward, WI 54843

Although Wisconsin Judicare, Inc., filed a notice of appearance as counsel for the Lac Courte Oreilles Band in 1978, I have been advised by Kathryn L. Tierney by telephone that she has replaced Wisconsin Judicare, Inc., as counsel for the Lac Courte Oreilles Band.

/s/ Mary V. Bowman
MARY V. BOWMAN
Assistant Attorney General

FISH AND GAME 29.09

Section 29.09(1), Wisconsin Statutes

29.09 Hunting, trapping and fishing licenses. (1) HUNTING, TRAPPING OR FISHING WITHOUT A LICENSE PROHIBITED. Except as expressly provided, no person shall: (a) hunt any wild animal, or (b) trap any game, or (c) take, catch or kill fish or fish for fish in inland water of this state unless a license therefor has been duly issued to him which shall be carried with him at all times while hunting, trapping or fishing as the case may be and which shall be exhibited to the department or its wardens on demand. Such licenses shall be issued to and obtained by only natural persons lawfully entitled thereto, and in case of resident hunting, trapping or fishing licenses, shall be issued only to persons who present to the county clerk or issuing agent definite proof of his identity, and that he is a legal resident of this state. No more than one of the same series shall be issued to the same person in any year. No person shall transfer his license or tag or permit the use thereof by any other persons, nor shall any person while hunting, trapping or fishing use or carry any license, tag or badge, issued to another. No hunting, fishing or trapping license, or tag shall be obtained by any person for another. No hunting license shall be issued to any person under the age of 12 years. Any person between the ages of 12 and 16 years may hunt only when accompanied by a parent or guardian, or by a person over 18 years of age designated by the parent or guardian. Indians hunting, fishing or trapping off Indian reservation lands are subject to this chapter.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

LAC COURTE OREILLES BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS; and FREDERICK
TRIBBLE and MICHAEL TRIBBLE, individually and
on behalf of all persons similarly situated,
Plaintiffs,

vs.

LESTER P. VOIGT, individually and as Secretary of
the Department of Natural Resources, State of
Wisconsin; NORMAN L. YACKEL, individually, as
District Attorney for Sawyer County, Wisconsin, and
as a representative of the group of all District
Attorneys and Assistant District Attorneys in the
ceded territory; LARRY MILLER and MILTON
DIECKMAN, individually, as Conservation Wardens
for the Department of Wisconsin, and as
representatives of the group of all conservation
wardens in the ceded territory; DONALD PRIMLEY,
individually, as Sheriff for Sawyer County, Wisconsin,
and as a representative of the group of all ex officio
Conservation Wardens in the ceded territory; THEIR
AGENTS, ASSISTANTS, SUCCESSORS,
EMPLOYEES, ATTORNEYS AND ALL THOSE
ACTING IN CONSORT WITH THEM OR AT THEIR
DIRECTION,

Defendants.

AMENDED COMPLAINT

Civil Action No. 74-C-313

I**PRELIMINARY STATEMENT**

1. Plaintiffs seek to have this court declare that the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, and its members, are entitled, pursuant to Article 5 of the Treaty of 1837, 7 Stat. 536, and Article 2 of the Treaty of 1842, 7 Stat. 591, to hunt, fish, and gather wild rice within the territory ceded by said Treaties without any interference, regulation, control, or licensing by Defendants, their agents, employees or successors.

2. In addition, plaintiffs seek to have this court declare unconstitutional and enjoin the enforcement of Wis. Stat. § 29.09(1) (1971) which provides that Indians hunting, fishing, or trapping off Indian reservation lands are subject to Wisconsin fish and game laws. The statute is challenged on the grounds that it is in conflict with Public Law 280, 18 U.S.C. §1162(b); the Treaty of 1837, 7 Stat. 536; the Treaty of 1842, 7 Stat. 591; and Article VI, Section 2 of the United States Constitution.

JURISDICTION

3. Jurisdiction of this court is invoked pursuant to 28 U.S.C. §§ 1331(a), 1343(3), and 1362. The amount in controversy exceeds \$10,000, exclusive of interest and costs. Furthermore, a declaration of rights is sought pursuant to 28 U.S.C. §§ 2201 and 2202 and other relief pursuant to 42 U.S.C. § 1983.

PLAINTIFFS

4. The Lac Courte Oreilles Band of Lake Superior Chippewa Indians of Wisconsin is a Band of Chippewa Indians established in accordance with § 16 of the

Indian Reorganization Act of 1934, 25 U.S.C. § 476, with a governing body duly recognized by the Secretary of Interior. The band sues on behalf of itself and all individual members.

5. Frederick Tribble is an enrolled member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. He is presently being prosecuted in Sawyer County Court for exercising his hunting, fishing and ricing rights pursuant to Article 5 of the Treaty of 1837 and Article 2 of the Treaty of 1842.

6. Michael Tribble is an enrolled member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. He presently has no cases pending against him involving hunting, fishing or ricing violations in the 1837 or 1842 ceded territory. He is threatened by the prospect of prosecution for exercising his ceded territory treaty rights.

DEFENDANTS

7. Lester P. Voigt is the Secretary of the Wisconsin Department of Natural Resources. He manages the Department of Natural Resources in accordance with statutes, rules and policies of the Natural Resources Board and is responsible for the administration and enforcement of the Fish and Game Laws of the State of Wisconsin through the Division of Enforcement of the Department of Natural Resources. He is sued individually and in his official capacity.

8. Norman L. Yackel is the District Attorney for Sawyer County, Wisconsin. He has the duty to prosecute violations of Chapter 29 of the Wisconsin Statutes and regulations adopted pursuant thereto. He is sued individually and in his official capacity.

9. Larry Miller and Milton Dieckman are Conservation Wardens employed by the Department of Natural

Resources for the State of Wisconsin. They are charged with the enforcement of Chapter 29 of the Wisconsin Statutes and the regulations adopted pursuant thereto. They are sued individually and in their official capacities.

10. Donald Primley is the Sheriff for Sawyer County. Pursuant to Wis. Stat. § 29.07 he is an ex officio deputy conservation warden. He is sued individually and in his official capacity.

CLASS ACTION

11. Plaintiff Frederick Tribble brings this action on his own behalf and, pursuant to Rule 23(a) and (b) (2) of the FRCP, on behalf of all other persons similarly situated.

The members of the class similarly situated are all those members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians who are being prosecuted for exercising their hunting, fishing, and ricing rights pursuant to Article 5 of the Treaty of 1837 and Article 2 of the Treaty of 1842.

12. Plaintiff Michael Tribble brings this action on his own behalf, and pursuant to Rule 23(a) and (b) (2) of the FRCP, on behalf of all other persons similarly situated.

The members of the class similarly situated are all those members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians who are threatened with prosecution for exercising their hunting, fishing, and ricing rights pursuant to Article 5 of the Treaty of 1837 and Article 2 of the Treaty of 1842.

13. Defendant Yackel is sued as a representative of the class of all District Attorneys and Assistant District Attorneys who prosecute violations of Chapter 29 of the Wisconsin Statutes in the 1837 and 1842 ceded territory.

The suit against this class is brought pursuant to Rule 23(a) and (b) (2) of the FRCP.

14. Defendants Larry Miller and Milton Dieckman are sued as representatives of the class of all conservation wardens charged with the enforcement of Chapter 29 of the Wisconsin Statutes in the 1837 and 1842 ceded territory.

The suit against this class is brought pursuant to Rule 23(a) and (b) (2) of the FRCP.

15. Defendant Primley is sued as a representative of the class of all ex officio Deputy Conservation Wardens (see Wis. Stat. § 29.07) charged with the enforcement of Chapter 29 of the Wisconsin Statutes in the 1837 and 1842 ceded territory.

The suit against this class is brought pursuant to Rule 23(a) and (b) (2) of the FRCP.

16. The requirements of Rule 23 are met in that: the above named classes are so numerous that joinder of all members is impracticable; there are questions of law and fact common to the classes; the claims of the representative parties are typical of the claims of the classes; the representative parties will fairly and adequately protect the interests of the classes; and the parties opposing the classes have acted on grounds generally applicable to the classes, thereby making appropriate final injunctive and declaratory relief with respect to the classes as a whole.

CAUSE OF ACTION

17. The Treaty of 1837, 7 Stat. 536 was entered into on July 29, 1837. The United States Senate advised and consented to ratification of the Treaty on June 11, 1838, and President Martin Van Buren ratified and Proclaimed the Treaty on June 15, 1838. The Lac Courte Oreilles Band of Lake Superior Chippewa was a party to this

treaty as is evidenced by the signature of Pa-qua-a-mo, their chief.

18. Article 5 of the Treaty of 1837, 7 Stat. 536, provides, "the privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guaranteed to the Indians, during the pleasure of the President of the United States." Said article has never been rescinded.

19. The Treaty of 1842, 7 Stat. 591, was entered into on October 4, 1842. The United States Senate advised and consented to the ratification of the Treaty, and the President ratified and proclaimed the Treaty on March 23, 1843. The Lac Courte Oreilles Band was a party to this Treaty as is evidenced by the signatures of Ne-na-nang-eb, Be-bo-kon-uen, and Ki-uen-zi.

20. Article 2 of the Treaty of 1842, 7 Stat. 591, provides, "the Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States..." Said article has never been rescinded.

21. No act of Congress has abrogated, lessened, or interfered with said treaty rights and with plaintiffs' rights to regulate their treaty rights, nor has any act of Congress transferred to the State of Wisconsin the power or jurisdiction to control or regulate or license the exercise of said treaty rights.

22. For a number of years, the defendants and their predecessors, despite the protestation of the plaintiffs, have been prosecuting Lac Courte Oreilles Chippewa Indians and confiscating their property for violations of the Wisconsin fish and game laws committed within the exterior boundaries of the territory ceded by the Treaties of 1837 and 1842.

23. The basis for said state prosecutions is Wis. Stat. § 29.09(1)(1971). Said prosecutions violate 42 U.S.C. § 1983 in that plaintiff and its members are deprived of their rights, privileges and immunities secured by Article VI of the United States Constitution, Article 5 of the Treaty of 1837, 7 Stat. 536, Article 2 of the Treaty of 1842, 7 Stat. 591, and Public Law 280, 18 U.S.C. § 1162(b).

24. Defendants, to this day, continue to prosecute Lake Superior Chippewa Indians for exercising their treaty rights to hunt, fish, trap and gather wild rice within the exterior boundaries of the territory ceded by the Treaties of 1837 and 1842. For example, the following cases are pending in various Wisconsin State Courts:

a) State - vs. - Melvin White: Defendant White is an enrolled member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. On September 2, 1972 a summons and complaint was issued charging him with a violation of Section 29.544(3) of the Wisconsin Statutes (1971), for harvesting wild rice without a license. This alleged violation occurred within the exterior boundaries of the territory ceded by the Treaty of 1837. This case is presently pending on appeal to the Supreme Court of the State of Wisconsin.

b) State - vs - Thomas J. Ford: Defendant Ford is an enrolled member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. On September 2, 1972 a summons and complaint was issued charging him with a violation of Section 29.544(4) of the Wisconsin Statutes (1971), for harvesting wild rice without a duly issued license. This alleged violation occurred within the exterior boundaries of the territory ceded by the Treaty of 1837. This case is presently pending on appeal to the Supreme Court of the State of Wisconsin.

c) **State - vs - Roger Diamond:** Defendant Diamond is an enrolled member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. On February 26, 1974 a summons and complaint was issued charging defendant with fishing in the Chippewa Flowage in violation of Wisconsin Administrative Code N.R. 20.03(3), possession of a spear in violation of Wisconsin Administrative Code N.R. 20.07(4)(a), and failure to have his name and address painted on a fish shanty in violation of Wisconsin Administrative Code N.R. 20.13(4). The alleged offenses in this case were committed within the territory ceded by the Treaty of 1837. This case is presently pending in this court on a removal petition.

d) **State - vs - Frederick Tribble:** Defendant Tribble is an enrolled member of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians. On March 12, 1974 a summons and complaint was issued charging defendant with possession of a spear in violation of Wisconsin Administrative Code N.R. 20.07(4)(a), and failure to have his name and address painted on a fish shanty in violation of Wisconsin Administrative Code N.R. 20.13(4). The alleged offenses in this case were committed within the territory ceded by the Treaty of 1837. This case is presently pending in this court on a removal petition.

25. On information and belief a substantial percentage of plaintiffs live in poverty and have hunted, fished, and riced throughout the years within the territory ceded by the Treaties of 1837 and 1842. Hunting, fishing and ricing have provided a vital supplement to the members' families' diets.

26. Due to the threat of prosecution and conviction, plaintiffs' treaty rights have been severely restricted,

resulting in the loss of this necessary supplement to their families' diets.

27. Unless the defendants, their agents, assistants, successors, employees, and all those acting in consort with them, or at their direction, are restrained during the pendency of this action from further enforcement of Wisconsin Stat. § 29.09(1) (1971) and the Fish and Game Laws of the State of Wisconsin against plaintiffs in the 1837 and 1842 ceded territory, plaintiffs will be unable to supplement their families' diets and therefore plaintiffs will suffer great and irreparable damage.

28. Plaintiff, La Courte Oreilles Band of Lake Superior Chippewa Indians, has no adequate remedy at law for violation of its treaty rights.

WHEREFORE, Plaintiffs pray that the Court will advance this case on the docket, hear this action at the earliest practicable date, cause this case to be in every way expedited and upon such hearing to:

1. Issue a preliminary injunction restraining defendants, their agents, assistants, successors, employees, and all those acting in consort with them, or at their direction, from further enforcement of Wis. Stat. § 29.09(1) (1971) and the Fish and Game Laws of the State of Wisconsin against plaintiffs pending final determination of this case.

2. Issue a Declaratory Judgment declaring that the Lac Courte Oreilles Band of Lake Superior Chippewa Indians and its members are entitled, pursuant to Article 5 of the Treaty of 1837, 7 Stat. 536, and Article 2 of the Treaty of 1842, 7 Stat. 591, to hunt, fish and gather wild rice within the territory ceded by said Treaties without any interference, regulation, control, or licensing by defendants, their agents, employees or successors.

3. Issue a Declaratory Judgment declaring that Wis. Stat. § 29.09(1) (1971) is unconstitutional in that it is

in conflict with Public Law 280, 18 U.S.C. § 1162(b); the Treaty of 1837, 7 Stat. 536; the Treaty of 1842, 7 Stat. 591; and Article VI, Section 2 of the United States Constitution.

4. Permanently enjoin defendants, their agents, assistants, employees, successors, and all those acting in consort with them or at their direction, from further enforcement of Wis. Stat. § 29.09(1) (1971) and the Fish and Game Laws of the State of Wisconsin against plaintiffs within the territory ceded by the Treaties of 1837 and 1842.

5. Allow plaintiffs their costs herein, including reasonable attorney's fees and such other relief as may appear to the Court to be equitable and just.

Dated this 18th day of February, 1975.

/s/ Peter J. Sferrazza
Peter J. Sferrazza
Attorney for Plaintiffs
Wisconsin Judicare, Inc.
811 North First Avenue
Wausau, Wisconsin 54401

No. 83-6

Office-Supreme Court, U.S.
FILED
AUG 8 1983
ALEXANDER L. STEVAS,

In The
Supreme Court of the United States

October Term, 1983

CARROLL D. BESADNY, ET AL.,
Appellants,

v.

**LAC COURTE OREILLES BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS, ET AL.,**
Appellees

**ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

MOTION TO DISMISS OR AFFIRM

Kathryn L. Tierney

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August 1983

QUESTIONS PRESENTED

1. Were the usufructuary rights reserved by the Lake Superior Chippewa in their treaties with the United States of 1837 and 1842 abrogated by the 1850 order of President Zachary Taylor directing that the Chippewa remove from their ceded lands?

2. Were the usufructuary rights reserved by the Lake Superior Chippewa in their 1837 and 1842 treaties with the United States released or extinguished by the Treaty of 1854?

PARTIES

Supplementing the parties named by the appellants in their Jurisdictional Statement, appellees, in addition to the named party, are Frederick Tribble and Michael Tribble, who appear in the case individually and as class representatives of all members of the Lac Courte Oreilles Band of Lake Superior Chippewa Indians who are unable to exercise claimed off-reservation usufructuary treaty rights due to prospective prosecution by appellants or their successors in office for alleged violations of State law.

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In The
Supreme Court of the United States

October Term, 1983

CARROLL D. BESADNY, ET AL.,
Appellants,

v.

LAC COURTE OREILLES BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS, ET AL.,
Appellees

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

Appellees Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al., respectfully move to dismiss or affirm the judgment of the United States Court of Appeals for the Seventh Circuit in this case, pursuant to Rule 16.1 (a) and (d), Rules of the United States Supreme Court.

STATEMENT OF THE CASE

This action was commenced in the United States District Court for the Western District of Wisconsin in 1974 by the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, a

federally recognized Indian Tribe, (hereinafter referred to as the Tribe) and two of its members, Frederick and Michael Tribble. Declaratory and injunctive relief was sought against the defendants, who are State and local officials whose duties include the enforcement of Wisconsin's fish and game laws. The suit was based upon the Tribe's right to hunt, fish, and gather, without regulation by the State of Wisconsin, on the lands ceded to the United States by the Lake Superior Chippewa, which was reserved by the Indians in the Treaty of 1837, 7 Stat. 536, and the Treaty of 1842, 7 Stat. 591. Federal court jurisdiction was invoked under 28 U.S.C. §§ 1331(a), 1343(3), 1362, and 2201. Cross-motions for summary judgment were filed by the parties in 1975, which were not ruled upon by the Honorable Judge James E. Doyle until 1978, when he issued an opinion which combined three cases then pending in his court. The decision is reported as *United States v. Bouchard*, 464 F.Supp. 1316 (W.D. Wis. 1978). Summary judgment was granted to the State and local officials and the complaint was dismissed. This decision was based on the trial court's construction of the effect of a later treaty with the Lake Superior Chippewa, the Treaty of September 30, 1854, 10 St. 1109. Through that treaty, the Lake Superior Chippewa obtained permanent reservations within the area ceded by the 1837 and 1842 treaties; the trial court interpreted this agreement to have thereby resulted in relinquishment by the Chippewa of the usufructuary rights that they had reserved throughout the lands ceded in earlier treaties. *United States v. Bouchard*, 464 F. Supp. at 1352; App. 126a.

The Tribe appealed this decision to the Court of Appeals for the Seventh Circuit in 1978 (No. 78-2398); the State and local officials cross-appealed (No. 78-2443) the district court's separate holding that the order issued by President Zachary Taylor in 1850, requiring that the Chippewa remove from their ceded lands, was invalid and therefore did not terminate the usufructuary rights secured by the earlier treaties. *Bouchard*, 464 F. Supp. at 1350; App. 121a. The State of Wisconsin appealed this holding as rendered in *United States v. Wisconsin*, (No. 79-1014), reported in *United States v. Bouchard, supra*, as *United States v. Ben*

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With the consent of all parties, the court of appeals ordered that briefing be suspended until resolution by the district court of another case then pending before it in which many of the documents of record would be utilized. Upon the issuance of the district court's decision in *United States v. Baker*, 524 F. Supp. 726 (W.D. Wis. 1981), the record was transmitted to the court of appeals and briefing was held in the pending appeals. The appeals were consolidated for purposes of oral argument and the January 25, 1983, decision of the court of appeals combines them.

The circuit court reversed the trial court's holding that the 1854 treaty effected a relinquishment of the usufructuary rights secured to the Chippewa by earlier treaties, and reversed that court's summary judgment in favor of the State and local officials. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 365 (7th Cir. 1983); App. 51a-52a. The case was remanded to the district court with instructions to enter judgment for the Tribe on this issue. *Id.* Further proceedings were also ordered, for "consideration as to the permissible scope of State regulation over the LCO's exercise of their usufructuary rights." 700 F.2d 341, 365; App. 52a. The court of appeals also affirmed the trial court's holding that the removal order was invalid. 700 F.2d 341, 362; App. 44a.

Incorporated in this statement of the case is the concise recitation of all the facts material to consideration of the questions presented which is contained in the opinion of the court below. 700 F.2d at 344-349; App. 3a-15a.

MOTION TO DISMISS

Appellees hereby move to dismiss the appeal on the ground that jurisdiction in this Court is wanting due to the absence of a declaration by the court of appeals that a State statute is invalid as repugnant to the Constitution, treaties or laws of the United States. 28 U.S.C. § 1254 (2). *See; Cross v. Bruning*, 385 U.S. 14 (1966), *reh. denied*, 385 U.S. 964 (1966); *Williams v. La Vallee*, 362 U.S. 637 (1960), *reh. denied*, 363 U.S. 832 (1960).

No law of the State of Wisconsin was determined to be invalid by the court of appeals in this case; that court did not even cite a Wisconsin statute or regulation in its opinion. Nor was such a determination arguably necessary for the court of appeals to resolve the issues presented to it by the parties in their cross-appeals. Those issues were: (1) the nature of the usufructuary rights retained by the Chippewa under the treaties of 1837 and 1842; (2) the existence of any subsequent act of the United States or the Chippewa which modified or extinguished the usufructuary rights. *Lac Courte Oreilles Band v. Voigt*, 700 F.2d 341, 343-344; App. 3a. The issue of state regulatory authority over the exercise of treaty-guaranteed usufructuary rights was expressly remanded to the district court for further proceedings, with no explication of the manner in which the issue was to be resolved in the trial court.

To base this appeal on the supposed determination that Wis. Stat §29.09(1) is inapplicable to the off-reservation usufructuary activities of the Tribe's members is therefore an incomprehensible error. It should be noted that appellants do not cite any language in the court of appeals' opinion which holds that statute to be invalid; instead appellants cite portions of the Tribe's amended complaint which allege the statute to be invalid as applied to off-reservation hunting, fishing, and gathering activities of its members. No authority exists for the unique interpretation of 28 U.S.C. § 1254(2), that allegations in a complaint of a statute's invalidity are sufficient to constitute a holding of a Court of Appeals when it enters judgment in favor of the party challenging it application.

Another barrier to consideration of this appeal is that the decision below is not final. As is obvious from the nature of the court of appeals disposition of this case and its directions to the district court, further proceedings will be necessary in order to determine which, if any, Wisconsin hunting and fishing laws and regulations cannot be applied to off-reservation treaty hunting and fishing by the Tribe's members. Prior to such a determination, there exists no final holding concerning the invalidity of any Wisconsin fish and game

statute including Wis. Stat. §29.09(1). *Doran v. Salem Inn, Inc.*, 472 U.S. 92 (1975); *El Paso v. Simmons*, 379 U.S. 497 (1965). An appeal based on the expectation that this statute will be held inapplicable to Tribal members in later proceedings is therefore premature.¹

In the absence of a holding of invalidity of the proffered statute by the court of appeals, the appeal necessarily becomes a request of this Court to render an advisory opinion concerning the application of the statute to an undetermined set of circumstances. This Court has never construed its appellate jurisdiction to allow it to render advisory opinions. *See, e.g., Ashbury Hospital v. Cass County*, 326 U.S. 207, 213-214 (1945).

MOTION TO AFFIRM

Alternatively, appellees Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al., move to affirm the judgment of the Court of Appeals for the Seventh Circuit that the right to hunt, fish, and gather reserved by the Chippewa on the lands ceded to the United States in the 1837 and 1842 treaties have not been extinguished, abrogated or relinquished. It is manifest that the questions presented by appellants are so insubstantial as to make further arguments unnecessary.

A. The Court Of Appeals Properly Applied The Canons Of Treaty Con- struction To The Treaties At Issue.

1.) Appellants recognize the existence of the finality requirement as a potential barrier to this appeal, but apparently fail to recognize that the cases cited in support of their claim that this case is final (App. 2) are inapposite; all three cases were decided on a writ of certiorari to the court of appeals.

This Court has formulated several related rules of construction in interpreting treaties between the United States and Indian Tribes. These rules have become the standard introductory discussion in cases involving an Indian treaty, and the court of appeals likewise began with a recitation of the canons of construction. 700 F.2d at 350; App. 17a-18a. The first rule is that Indian treaties are to be construed as the Indians would have understood them. This rule of construction has been utilized by this Court since its decision in *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 528 (1832) (McLean, J. concurring), and has been restated in the exact same words in numerous decisions of this Court. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-631 (1970); *Tulee v. Washington*, 315 U.S. 681, 684-685 (1942); *United States v. Shoshone Tribe*, 304 U.S. 111, 116 (1938); *Jones v. Meehan*, 175 U.S. 1, 10-11 (1899).

No departure from this rule of construction was made by this Court in *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 675-676 (1979), as appellants suggest. The opinion in that case explicitly invokes this rule of construction in determining the scope of the off-reservation fishing rights secured to the tribes in Washington by their treaties with the United States. The court of appeals was clearly correct in applying this hallowed and viable rule of treaty construction to the treaties at issue here.

Two other well-recognized canons of Indian treaty construction also apply to this case: (1) that doubtful expressions and ambiguities in the treaty are to be resolved in favor of the Indian parties, *Arizona v. California*, 373 U.S. 546, 599-601 (1963); *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918); *Winters v. United States*, 207 U.S. 564, 576-577 (1908); and (2) that treaties should be construed liberally in favor of the Indians, with a view toward the practical construction adopted by the parties. *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943); *United States v. Shoshone Tribe*, *supra*.

The rationale for the development of these interpretive canons, which direct a court's inquiry well beyond the four corners of the agreement at issue, is the recognition of the

disparity between the parties:

"In construing any treaty between the United States and an Indian tribe, it must always...be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

Jones v. Meehan, supra, at 10-11. The record in this case clearly demonstrates the above considerations apply to the circumstances surrounding the treaties of 1837, 1842, and 1854.

The court of appeals utilized all the appropriate rules of construction in interpreting the provisions of the treaties at issue. The court took into consideration the history of the times, the circumstances surrounding the treaties, and the parties' practical construction of the terms, in reviewing the two matters of factual dispute raised in the appellate court: the first being the conditions under which the Chippewa would be removed from their lands ceded in the treaties of 1837 and 1842, and the second being the impact on the rights to hunt, fish, and gather reserved in those treaties by the signing of the treaty of 1854. It is on those two issues that appellants base their appeal. Rather than engage in treaty revision or rewriting, however, the court of appeals carefully applied to those issues the requisite interpretive

canons. Its conclusions concerning the rights reserved by the treaties of 1837 and 1842 and the effect of the treaty of 1854 upon them is independently supported by the standard of appellate review applicable to this case. To that matter appellees now turn.

**B. The Court Of Appeals Properly Based
Its Holdings In This Case Upon The
Standard Of Review Applicable To
Motions For Summary Judgment.**

The posture of this case in the court below was cross-appeals from a grant of summary judgment in favor of the State and local officials. In such a case, the court adopted the traditional standard for appellate review of a grant of summary judgment: that summary judgment will not lie unless, construing all inferences in favor of the party against whom the motion is made, no genuine issue of material fact exists. 700 F.2d at 349; App. 16a. This standard is as applicable to cross-motions as it is to cases in which only one party is the movant. *Pharo v. Smith*, 621 F.2d 656 (5th Cir. 1980), *reh. granted in part and remanded on other grounds*, 625 F.2d 1226 (5th Cir. 1980); *United States v. Bob Chrislaw*, 341 F.2d 887 (7th Cir. 1965).

As the State and local officials were granted summary judgment by the district court, all inferences of fact concerning the intent of the parties to the Treaty of 1854 were made in favor of the Tribe. 700 F.2d at 364; App. 48a-49a. And as the district court held that the 1850 order of removal was invalid, all inferences of fact concerning that matter were made in favor of the State and local officials. The role of the appellate court in a summary judgement appeal is to review the trial court's conclusions that no genuine issue of material fact existed. The court of appeals is not required to reverse the trial court if any evidence exists which supports appellants position, but only if that evidence makes erroneous the trial court's determination that no genuine issue of material fact exists. The court of appeals properly concluded that no genuine issue of material fact existed which precluded the trial court from finding that

the removal order of 1850 was invalid. 700 F.2d at 362; App. 33a-34a.

C. The Removal Order Of 1850 Did Not
Terminate The Tribe's Hunting And
Fishing Rights.

1. The Order Was Not Au-
thorized By The Earlier
Treaties.

The order of President Zachary Taylor to the Chippewa in 1850 required them to remove from their lands ceded in 1837 and 1842 and to move to their unceded land in Minnesota Territory. Appellants argue that this action was clearly authorized by the 1837 and 1842 treaties themselves. Both the trial court and the court of appeals disagreed, after construing the purported grants of authority in the treaties in light of the surrounding negotiations and the express representations of the federal treaty negotiators to the Chippewa that they would not be required to remove unless they "misbehaved." *Bouchard*, 464 F. Supp. at 1349, App. 118a-119a; *Voigt*, 700 F.2d at 361, App. 42a-43a. Appellants first challenge this interpretation of the treaty clauses as requiring either misbehavior or the passage of a significant number of years as the necessary predicate to an order of removal. In doing so, appellants challenge the treaty interpretation canons of construction which were discussed in Part A of this Motion. Appellants' arguments concerning the scope of the Executive Branch's authority to order removal were made to both the district court and the court of appeals, and present no substantial matters which require plenary consideration of this question.

Appellants next challenge the rule of law employed to determine the validity of an Executive Order issued outside the scope of the authorization contained in the treaties. Executive Orders which exceed their authorization from

Congress are invalid. *Cole v. Young*, 351 U.S. 536 (1956); *Youngstown Sheet & Tube Co. v. Sawyer*, - 343 U.S. 579 (1952); *Marks v. CMA*, 590 F.2d 997 (D.C. Cir. 1978); *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976). In this case, the presumption of validity which is accorded to executive orders promulgated in supposed accordance with an act of Congress, is clearly overcome by the evidence in the record that such an order would not be issued without cause.

The holding of the Court of Appeals that the 1850 order was invalid as an unauthorized act of the Executive Branch is not in error.

Additional grounds for holding that the 1850 removal order did not effectuate a termination of the Chippewas' hunting, fishing, and gathering rights were presented to the court of appeals, but were not reached by that court in light of its holding that the removal order was invalid. They are presented here as an alternative basis for upholding the summary judgment granted to the Tribe concerning the effect of the 1850 order on the existence of the right to hunt, fish, and gather in the ceded lands. *Helvering v. Gowran*, 302 U.S. 238 (1937); 10 C. Wright & A. Miller, *Federal Practice and Procedure* § 2716, at 440 (1973).

2. The Removal Order Was Revoked By Later Executive And Congressional Action.

The implementation of the 1850 removal order was suspended on August 25, 1851, through a telegram directive from the Commissioner of Indian Affairs to the Indian Agent. The removal efforts were reported to Washington as

suspended. The following year a delegation of Chippewa leaders traveled to Washington to request that then - President Millard Fillmore explicitly terminate the removal efforts. No document signed by President Fillmore exists which explicitly contravenes the removal effort, but his promise to the Chippewa to return the annuity payment location to LaPointe in Wisconsin was carried out. Annuity payments were made there in 1853 and 1854, as well. 700 F.2d 347-348; App. 11a-13a.

The removal policy was formally abandoned by the negotiation with the Lake Superior Chippewa of a new treaty in 1854, which established permanent homes for the Chippewa in Wisconsin. Art. 2, 10 Stat. 1109, App. 163a.

As the sequence of events makes clear, the removal order of 1850 had no effect on the Chippewa's usufructuary rights. It was suspended in little more than a year by the succeeding administration, and had no further operative effect. The idea of removal was completely abandoned in the Treaty of 1854, which included therein a prohibition against any further removal efforts by any future President. Art. 11, 10 Stat. 1109, App. 167a-168a.

The only other court which has directly considered the effect of the 1850 removal order on the usufructuary rights of the Chippewa reserved in earlier treaties is the Wisconsin Supreme Court. In *State of Wisconsin v. Gurnoe*, 53 Wis. 2d 390; 192 N.W.2d 892 (1972), that court rejected the State of Wisconsin's argument that the 1850 removal order abrogated the right to fish in the Wisconsin waters of Lake Superior. The court reasoned that the removal order was never implemented, and was therefore ineffective to terminate any usufructuary rights. The court further noted that the removal order was impliedly revoked through the Treaty of 1854. 53 Wis. 2d at 406-407.

3. The Removal Order Did Not Apply To The Tribe's Rights Under the Treaty Of 1837.

The language of the removal order does not apply to the area ceded pursuant to the 1837 treaty by the Lake Superior Chippewa. The order explicitly omits any reference to the usufructuary rights in the 1837 cession area held by the Chippewa of Lake Superior, of which the Tribe is a part:

The privileges granted temporarily to the *Chippewa Indians of the Mississippi*, by ... the treaty ... of July 1837 .. and the rights granted to the *Chippewa Indians of the Mississippi and Lake Superior* by ... the treaty .. of October 4th, 1842 ... are hereby revoked ... (emphasis added)

Bouchard, 464 F. Supp. at 1326-1327; App. 67a.

Executive orders are subject to the same rules of construction as are applied to statutes dealing with Indian affairs, i.e., that they are to be liberally construed in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 655 n.7 (1976); *Alaska Pacific Fisheries v. United States*, *supra*. The omission of the usufructuary rights of the Lake Superior Chippewa in the area ceded by them in 1837 is an ambiguity which must be resolved in favor of the Indians. The general rule of construction, *expressio unius est exclusio alterius*, as applied to the executive order here, requires that the order be construed as having no effect on the Tribe's right to hunt, fish, and gather in the 1837 cession area.

4. Mole Lake Band v. United States Has No Res Judicata Or Collateral Estoppel Effect On This Case.

Appellants' claim of error by the court of appeals in declining to accord *res judicata* effect to the Court of Claims decision in *Mole Lake Band v. United States*, 139 F.Supp. 938 (Ct. Cl. 1956), *cert. denied*, 352 U.S. 892 (1956) is without merit. As the court of appeals pointed out, the State of Wisconsin was not formally a party to those proceedings, which is a fundamental prerequisite to application of the doctrine to any subsequent case involving the Tribe. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). Equally a fundamental prerequisite is the identical nature of the issues in both cases. The court of appeals correctly noted that the issues presented to the Court of Claims in *Mole Lake Band* did not include the validity or effect of the removal order and its effect on the 1837 and 1842 treaty usufructuary rights, and that the court's discussion on the effect of the order was in the context of the recitation of the historical events. That court was presented with the question of title to swamp lands included within the reservations established by the 1854 treaty. The court of appeals properly declined therefore to accord *res judicata* effect to the *Mole Lake Band* decision.

Due to the complete disparity in the issues presented in *Mole Lake Band* and in this case, the doctrine of collateral estoppel is equally inapplicable. *Parklane Hosiery Co. v. Shore*, *supra*, at 326 n.5.

D. The Court Of Appeals Correctly Held
That The 1854 Treaty Did Not Release
Or Extinguish The Usufructuary
Rights.

The rule of law that treaty-reserved usufructuary rights cannot be abrogated by implication, *Menominee Tribe v.*

United States; 391 U.S. 404 (1968) has always been followed by this Court. Later actions of Congress which could be construed to have limited or abrogated a treaty reserved right have been consistently held not to have such an effect without clear and express evidence that such a result was intended. *See, United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd in relevant part*; 653 F.2d 277 (6th Cir. 1981), *cert. denied*, 454 U.S. 1124 (1981); *United States v. White*, 508 F.2d 453, 456 (8th Cir. 1974); *Kimball v. Caulahan*, 493 F.2d 564 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974); *Confederated Tribes v. Alexander*, 440 F.Supp. 553 (D. Or. 1977); *People v. LeBlanc*, 399 Mich. 31; 248 N.W. 2d 199 (1976). There exists no clear and express evidence that the treaty of 1854 was intended by the parties to effect a relinquishment of the usufructuary rights reserved in earlier treaties. The court below properly declined to imply such an intent.

Appellants' claim of error by the court below in finding no relinquishment by the Chippewa of their treaty-reserved usufructuary rights though operation of the 1854 treaty is based upon several erroneous assumptions. The first assumption is that there exists a body of caselaw which holds that treaty-reserved, as distinguished from aboriginal usufructuary rights can be extinguished without express language to that effect in a subsequent act of Congress. *See, e.g., Lower Brule Sioux Tribe v. South Dakota*, F.2d , Case No. 82-1635 (8th Cir. June 27, 1983), and cases discussed therein.

The second assumption made by appellants is that use of the land is, and must be, tied directly with the right to occupy the land. Reservations in treaties are not limited to real estate, but can be of any aspect of aboriginal or recognized title; tribes often reserved hunting and fishing rights in areas outside their reservation boundaries. *See, e.g., Washington v. Fishing Vessel Ass'n, supra, Antoine v. Washington*, 420 U.S. 194 (1975); *United States v. Winans*, 198 U.S. 371 (1905); *Sohappy v. Smith*, 302 F. Supp. 899 (D. Or 1969); *People v. Jondreau*, 348 Mich 539, 185 N.W. 2d 375 (1971). *Accord, Lower Brule Sioux Tribe v. South*

Dakota, supra, at 24-25. This division between the right to occupy and the right to use land is well recognized in treaty cases; the treaty-reserved usufructuary rights reserved in lands not owned, or later ceded, by Indian tribes has been characterized as a form of tribal communal property comparable to a profit a prendre. *United States v. Washington*, 520 F. 2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976); *Van Camp v. Menominee Enterprises*, 68 Wis. 2d 332, 228 N.W. 2d 664 (1975).

The third assumption of appellants' claim of error is the unfounded distinction between usufructuary rights which have no implied limitation as to duration, and usufructuary rights which could be terminated upon the satisfaction of the stated condition. There is no support in the case law for such a distinction, when the issue is whether or not such rights can be extinguished by implication. Conditional treaty usufructuary rights are not unique to the Treaties of 1837 and 1842; the treaties with the Ottawa and Chippewa of Michigan also contained limiting language. The reservation of the usufructuary rights "until the land is required for settlement", Art. 13, Treaty of March 28, 1836, 7 Stat. 491, was not considered by the courts ascertaining its meaning to authorize relinquishment by implication in the 1855 Treaty with the Indians. *United States v. Michigan, supra*; *People v. LeBlanc, supra*.

There exists no disparity between existing caselaw concerning treaty interpretation and abrogation and the result reached by the court below in this case.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1983

CARROLL D. BESADNY, ET AL., APPELLANTS

v.

LAC COURTE OREILLES BAND OF LAKE SUPERIOR
CHIPPEWA INDIANS, ET AL.

ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS
IN PART AND AFFIRM IN PART

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QUESTIONS PRESENTED

1. Whether the court of appeals had jurisdiction to decide the appeal by the State of Wisconsin in *United States v. Wisconsin, et al. (Ben Ruby)* (7th Cir. No. 79-1014).

2. Whether the court of appeals correctly determined that the off-reservation hunting, fishing, and gathering rights of the Lac Courte Oreilles Band of Chippewa Indians under the Treaties of 1837 and 1842 were not abrogated by an 1850 Executive Order.

3. Whether the court of appeals correctly determined that the off-reservation hunting, fishing, and gathering rights of the Lac Courte Oreilles Band of Chippewa Indians were not abrogated by treaty in 1854.

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In the Supreme Court of the United States

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CARROLL D. BESADNY, ET AL., APPELLANTS

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LAC COURTE OREILLES BAND OF LAKE SUPERIOR
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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS
IN PART AND AFFIRM IN PART

The Solicitor General, on behalf of the United States, moves the Court to dismiss the appeal for lack of jurisdiction insofar as it seeks review of the judgment of the Court of Appeals in *United States v. Wisconsin (Ben Ruby)* and to affirm the judgment of that court in *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1983 (J.S. App. 175a). The petition for rehearing was denied on March 8, 1983 (J.S. App. 177a). A notice of appeal (J.S. App. 180a) was filed on April 27, 1983. The jurisdictional statement was filed on July 5, 1983. The jurisdiction of this

Court is invoked under 28 U.S.C. 1254(2). As we elaborate in a moment (pages 8-9, *infra*), we believe the Court lacks jurisdiction to entertain one aspect of the appeal.

STATEMENT

1. The present controversy stems from a series of mid-Nineteenth Century treaties and events involving the Lake Superior Tribe of Chippewa Indians in the territory that now comprises the State of Wisconsin. In 1837, the United States entered into a treaty with the Chippewas which provided that the Chippewa Nation of Indians "cede to the United States all that tract of country" described in the treaty, including what is now the Lac Courte Oreilles Reservation (7 Stat. 536; J.S. App. 59a). The treaty provided, *inter alia*, that "[t]he privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied to the Indians, during the pleasure of the President of the United States" (J.S. App. 153a). Commissioner Dodge, representing the United States, assured the Indians that it would "probably be many years before your Great Father will want all these lands for the use of his White Children" (*id.* at 59a).

In 1842, the United States entered into another treaty with the Chippewas in which the Indians ceded certain lands north of the 1837 cession (7 Stat. 591; J.S. App. 156a-161a). The Indians stipulated "for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States * * *" (J.S. App. 157a). The 1837 and 1842 treaties together transferred approximately 5 million acres in the northern two-fifths of Wisconsin to the United States.

White settlers and miners began to move into the ceded territory shortly after the 1842 treaty (*id.* at 62a). By 1847, government agents had begun steps to remove the Chippewas (*id.* at 64a).¹ In 1850, President Taylor issued an Executive Order revoking the privileges of occupancy granted to the Indians in the Treaties of 1837 and 1842, and ordering them to remove to Chippewa lands in Minnesota (*id.* at 67a). Despite repeated efforts to carry out removal, many of the Chippewas refused to move (*id.* at 72a). By 1854, the Commissioner of Indian Affairs had concluded that creation of reservations in Wisconsin would be a more practical solution than the removal policy. The legislature of Wisconsin agreed and memorialized the President and Congress to halt efforts at removal (*id.* at 75a-76a). The government undertook to negotiate a new treaty.

The Treaty of La Pointe, 10 Stat. 1109, was concluded September 30, 1854. Under the treaty the Indians ceded certain land in Minnesota, and the United States agreed "to set apart and withhold from sale for the use of the Chippewas of Lake Superior" three described tracts of land, including one "on Lac Court Oreilles * * * equal in extent to three townships, the boundaries of which shall be hereafter agreed upon or fixed under the direction of the President" (J.S. App. 163a). A survey of the land was accepted by the Surveyor General in 1856 (*id.* at 80a).

In 1859, a government agent was appointed to confer with the Lac Courte Oreilles chiefs to select a tract "equal in extent to three townships" from among

¹ The Wisconsin Enabling Act with its grant of school lands was enacted in 1846, and Wisconsin was admitted to statehood in 1848 (J.S. App. 62a-63a).

nine townships which had been withdrawn for sale for that purpose (*ibid.*). The government agent sent a list of selected lands to the General Land Office and the selections were entered upon the land office plats in 1859. The selected lands included section 16 lands. Because the lands selected were not all contiguous and the boundaries were unclear, the selections proved unsatisfactory and disagreements arose (*id.* at 81a).

In 1865, additional lands were withdrawn from sale so that the Indians could make further selections of land to replace the troublesome detached tracts. In 1872, the Commissioner of Indian Affairs instructed his agent to negotiate an adjusted selection, omitting section 16 lands from final selections.² A final list of selected lands was approved by the Secretary of the Interior on March 1, 1873. They comprised 69,136.41 acres (slightly more than three townships) (*id.* at 81a-82a).

2. Three related actions were considered together by the district court, and decided in one opinion (J.S. App. 54a-147a). The first, *United States v. Wisconsin, et al. (Ben Ruby)*, was filed by the United States against the State of Wisconsin and various private parties (Ben Ruby, *et al.*). The United States sought a declaratory judgment that it held fee title to three sections of land within the exterior boundaries of the Lac Courte Oreilles Indian Reservation in Wisconsin for the benefit of the Lac Courte Oreilles Band of Chippewa Indians (the Band). Each of the

² The agent was specifically instructed "to omit Section 16 of each township * * *. These sections are claimed by the State as school lands and it [is] thought best to avoid controversy in regard to them" (J.S. App. 81a). No sections 16 were included among the Indians' selections, and there is no evidence that the Indians objected to their exclusion.

three sections was a section 16, or "school section," i.e., the section within a township set aside for public school purposes under the Wisconsin Enabling Act of August 6, 1846, § 7, 9 Stat. 56, 58. This Act granted each section 16 not "sold or otherwise disposed of" to the State for these purposes (J.S. App. 55a). The State based its claim on grants under that Act and the private defendants based theirs on subsequent patents granted by the State (*id.* at 55a-56a). The United States argued that the school sections had been "otherwise disposed of" as a result of treaties entered into by the Chippewas with the United States in 1837 and 1842 (*id.* at 55a). The district court held that title in the disputed section 16 lands is in the State and the State's grantees (*id.* at 137a). In so holding, however, the district court rejected the State's argument that the Indians' rights to land in Wisconsin, other than those subsequently granted by a treaty in 1854, were wholly extinguished by Executive Order in 1850. The United States did not appeal. However, the State took what it denominated a "cross-appeal" to challenge the basis for the district court's holding.

United States v. Bouchard was a criminal proceeding brought pursuant to 18 U.S.C. 1165 (*id.* at 55a). The United States claimed that Bouchard trespassed upon a waterway belonging to the Bad River Tribe, part of the Lake Superior Tribe of Chippewa (*id.* at 83a). Bouchard contended that the waterway involved did not belong to the Tribe or the United States but had become property of the State of Wisconsin upon its admission to the Union in 1848 (*id.* at 55a). The United States argued that the rights granted to the Chippewa by treaty in 1842 prevented passage of title to the State or, alternatively, that the 1854 treaty

between the United States and the Chippewa granted exclusive use of the waterway to the Tribe (*ibid.*). The district court dismissed the criminal information in *United States v. Bouchard*, finding that the waterway in question had become the property of the State of Wisconsin upon its admission to statehood in 1848 and therefore did not belong to an Indian tribe (*id.* at 84a). No appeal was taken in that case by the United States, and the State was not a party.

Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Voigt was an injunctive and declaratory judgment action brought by the Band, in which it claimed the right to hunt, fish, and gather rice on publicly-owned lands in northern Wisconsin, free from state regulation, pursuant to the 1837 and 1842 treaties (*id.* at 56a). The United States was not a party to the proceeding. In its amended complaint, the Band asked the court to declare unconstitutional and enjoin the enforcement of Wis. Stat. Ann. § 29.09(1) (West 1973) insofar as it applied to the Band's off-reservation hunting, fishing, and trapping (J.S. App. 184a). Wisconsin Stat. § 29.09(1), which prohibits hunting, fishing, and trapping without a license, applies by its terms to "Indians hunting, fishing or trapping off Indian reservation lands" (*id.* at 182a). The district court held that any off-reservation hunting, fishing, and gathering rights reserved by the Band in the 1837 and 1842 treaties had been released or extinguished by the Treaty of 1854 (*id.* at 141a-142a). In reaching this conclusion, the district court specifically rejected the State's contention that the Band's hunting, fishing, and gathering rights had been revoked by the 1850 Executive Order (*id.* at 141a). The Band appealed and the State cross-appealed from the district court's decision. Accordingly, *Lac Courte*

Oreilles Band v. Voigt became the principal case on appeal to the Seventh Circuit (*id.* at 2a).

In the court of appeals, the United States participated only to the extent of questioning the propriety of the State's cross-appeal in *Ben Ruby*, in light of its having prevailed in the district court (Br. for the United States 5 n.5), and arguing that the 1850 Executive Order did not extinguish the Band's pre-1850 title because it was not enforced (*id.* at 5-6). The United States did not participate in briefing or argument in *Lac Courte Oreilles Band*.³

The court of appeals denied appellees' motion to dismiss the State's cross-appeal in *Ben Ruby* (J.S. App. 51a), and proceeded to the merits of *Lac Courte Oreilles Band*. While agreeing with the district court that the Band's off-reservation hunting, fishing, and gathering rights were not abrogated by Executive Order in 1850,⁴ the court rejected the district court's holding that the Band's off-reservation rights were extinguished by treaty in 1854. Accordingly, the court of appeals held that the Band "has retained treaty-reserved off-reservation hunting, fishing, trapping and gathering rights, collectively termed 'usufructuary rights,' in public lands in the northern third of Wisconsin and that such rights preclude State regulation" (J.S. App. 2a). Without identifying the state laws or regulations to which its holding referred, or even citing Wis. Stat. Ann. § 29.09(1) (West 1973), the court remanded to the district court

³ As noted, no party appealed or cross-appealed in *United States v. Bouchard*, and that decision is not at issue before this Court.

⁴ This was the issue on which the State cross-appealed in both cases.

"for further consideration as to the permissible scope of State regulation over the [Band's] exercise for [sic] their usufructuary rights" (*id.* at 52a).⁵

ARGUMENT

1. The United States moves to dismiss this appeal insofar as it seeks review of the decision of the case numbered 79-1014 in the court of appeals, *United States v. Wisconsin, et al. (Ben Ruby)*. We submit that the court of appeals had no jurisdiction to hear the State's appeal in *Ben Ruby*, and that the case is therefore not properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. 1254(2).⁶ Additionally, the State lacks standing as an aggrieved party necessary to appeal to this Court under 28 U.S.C. 1254(2).

⁵ In a case argued the same day before the same panel, but not involved in this appeal, the Seventh Circuit held that the Lac Courte Oreilles Band does not have jurisdiction to restrict hunting and fishing by non-Indians on navigable lakes adjacent to reservation lands (*Wisconsin v. Baker*, 698 F.2d 1323 (7th Cir. 1983), cert. denied, No. 82-1756 (June 27, 1983)).

⁶ The court of appeals correctly noted that the State could urge the validity of the 1850 Executive Order as an alternative basis for upholding the district court's judgment (J.S. App. 37a). Finding that the issue of jurisdiction over the State's cross-appeal would have "no effect on the course of our opinion or the disposition of this case," however, the court "assume[d], without so deciding, that the defendants are aggrieved parties who have standing to challenge the findings of the judge below as to the Removal Order" (*id.* at 37a-38a). This holding, we submit, was in error. The question of jurisdiction is prior to judgment on the merits (*Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)), and in the absence of jurisdiction, the court of appeals should have granted the motion to dismiss.

The district court in *Ben Ruby* found title to the land in question in the State and its assignees, and the United States did not appeal. The State has no right of appeal to challenge the *reasoning* of the courts below, where it is not aggrieved by the judgment. "Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980); see *New York Telephone Co. v. Maltbie*, 291 U.S. 645 (1934). An exception is recognized only where the interests of the prevailing party are prejudiced by an adjudication of rights immaterial to the disposition of the main cause. *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241, 242 (1939). In the instant case, the State is not prejudiced in any fashion by the district court's judgment in *Ben Ruby*, because it prevailed in all respects on the only matter in controversy, *i.e.*, title to the section 16 lands. No disposition of the State's cross-appeal could affect any rights of the parties to the litigation. See *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). This Court should therefore dismiss the appeal and vacate the judgment of the court of appeals, insofar as it pertains to the district court's decision in *Ben Ruby*.⁷

2. On the other hand, we believe that the State's appeal in *Lac Courte Oreilles Band*, No. 78-2443 in the court of appeals, is properly within this Court's jurisdiction under 28 U.S.C. 1254(2), notwithstanding

⁷ For the same reason, this Court lacks jurisdiction to review the *Ben Ruby* decision on writ of certiorari.

the court of appeals' failure to state in so many words that it was holding Wis. Stat. Ann. § 29.09(1) (West 1973) invalid as applied to members of the Band.

Statutes authorizing appeal to this Court are strictly construed. *Fornaris v. Ridge Tool Co.*, 400 U.S. 41, 42 n.1 (1970). The general principle has therefore developed that appeals may not be taken where the invalidity of the state statute is neither an explicit basis for the litigant's federal claim nor a necessary predicate for the court of appeals' decision.⁸ Here, the Band's amended complaint expressly sought invalidation of Wis. Stat. Ann. § 29.09(1) (West 1973) (J.S. App. 184a) and the court of appeals expressly held that the Band's off-reservation rights "preclude State regulation" (*id.* at 2a). There can be no question of a saving construction of the statute or of ultra vires enforcement, since the statute by its terms applies to "Indians hunting, fishing or trapping off Indian reservation lands" (*id.* at 182a). In short, a determination that Wis. Stat. Ann. § 29.09(1) (West 1973) is invalid as applied to members of the Band is

⁸ See Brief for the United States as Amicus Curiae in *Silkwood v. Kerr-McGee Corp.*, No. 81-2159. Copies of this brief have been provided to the parties in this appeal. An explicit statement by the court is necessary where the decision could be predicated on a finding other than invalidity of the state statute, for example: an interpretation of the statute designed to avoid questions about its constitutionality (see, e.g., *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561, 564-565 (1972) (28 U.S.C. 1252)); a finding of lawless behavior by state officials purportedly under a statutory grant of discretion (see, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562-563 n.4 (1980) (28 U.S.C. 1257(2))); or a finding of invalid non-legislative action pursuant to valid statutory authorization (see, e.g., *Perry Education Ass'n v. Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), slip op. 4-5 (28 U.S.C. 1254(2))).

“a necessary predicate to the relief” ordered by the court of appeals. *California v. Grace Brethren Church*, 457 U.S. 393, 405 (1982), quoting *United States v. Clark*, 445 U.S. 23, 26 n.2 (1980).

3. The State concedes, as it must, that the 1837 and 1842 treaties between the United States and the Chippewa Indians expressly reserved the Indians’ rights to hunt, fish, and gather rice throughout the 15 million acres of northern Wisconsin, until the President should exercise his power of removal. At issue is whether those rights were lawfully abrogated by either (1) the Executive Order signed by President Taylor in 1850, or (2) the 1854 Treaty of La Pointe between the United States and the Chippewas.

We submit, as we did in the court of appeals, that the 1850 Executive Order did not abrogate the Chippewas’ rights, either of occupancy or of use, because the Order was not enforced and was abandoned as national policy shortly after its promulgation. We also submit, on the issue not addressed in our brief below, that the court of appeals correctly construed the Treaty of 1854 and that plenary review by this Court of that fact-bound determination, consistent with other state and federal court judgments, is not necessary. We therefore urge this Court to affirm the judgment of the court of appeals.⁹

a. The district court and the court of appeals each concluded that the Executive Order signed by President Taylor in 1850 did not effectively extinguish the

⁹ We agree, for reasons stated by the court of appeals (J.S. App. 38a-42a), that the courts below were not bound by the decisions in *Mole Lake Band v. United States*, 139 F. Supp. 938 (Ct. Cl.), cert. denied, 352 U.S. 892 (1956), or *State v. Gurnoe*, 53 Wis. 2d 390, 192 N.W.2d 892 (Wis. 1972), by reason of res judicata or collateral estoppel.

Chippewas' hunting, fishing, and gathering rights under the 1837 and 1842 treaties because it was unauthorized by Act of Congress. The basis for this holding is that the Chippewas' understanding of the 1837 and 1842 treaties was that their rights would not be divested unless they "misbehaved," the land was needed for settlement, or a lengthy period of time, perhaps a generation, had passed. The courts further determined that none of these conditions had come to pass by 1850 and concluded, therefore, that the Executive Order was not valid. The State challenges this conclusion on two grounds. It asserts first that the authority of the President under the 1837 and 1842 treaties to remove the Chippewas from Wisconsin and hence to abrogate their rights of occupancy and use was unfettered (save for the requirement that he exercise sound discretion) (J.S. 13). It further asserts that, properly drawing all inferences in favor of the party against whom summary judgment was granted, there was ample evidence of "serious misbehavior" by the Chippewas justifying the removal order (J.S. 15, 18-20).

This Court need not resolve this controversy. Whether or not valid and authorized, the 1850 Executive Order does not determine the legal issues at hand because the Order was never enforced. As early as August, 1851 the Office of Indian Affairs instructed the superintendent in Wisconsin to "[s]uspend action with reference to the removal of Lake Superior Chippewas for further orders" (J.S. App. 71a). A delegation of Chippewas met with President Fillmore in 1852, and were reportedly told that the removal order would be countermanded. Also in 1852, the Chief informed his people that a new treaty would be negotiated (J.S. App. 73a-74a), and in 1854

the Treaty of La Pointe was signed, guaranteeing permanent homes to the Chippewas in Wisconsin.

This summary of the events of 1850-1854 shows that the removal order of 1850 was quickly abandoned as the policy of the United States, and superseded by the Treaty of La Pointe. Thus, the rights of the Chippewas in Wisconsin are determined not by the terms of the Executive Order, but by the terms of the 1854 Treaty. This was the conclusion reached by the Wisconsin Supreme Court in *State v. Gurnoe*, 53 Wis. 2d 390, 405-407, 192 N.W.2d 892, 899-900 (1972). The state and federal courts directly involved in interpretation of land rights in Wisconsin have thus agreed that the 1850 removal order does not have the effect of extinguishing the Chippewas' pre-1850 rights. There is no need for this Court to review the issue.

b. The effect of the 1854 treaty on the hunting and fishing rights of the Band, while less clear, was correctly determined by the court of appeals and presents no question justifying plenary review by this Court. By its terms, the 1854 treaty did not extinguish any of the Chippewas' rights, whether of use or of occupancy, in Wisconsin.¹⁰ Nevertheless, it is obvious that the establishment of fixed, permanent reservations implied that the Indians were giving up their rights of occupancy outside of the reservation. This is confirmed by a statement of the Chippewa Chief Buffalo during the negotiations: "We now understand that we are selling our lands as well as the timber and that the whole, with the exception of what we shall reserve, goes to the great father for-

¹⁰ The Tribe expressly ceded its rights to land in the Territory of Minnesota.

ever" (J.S. App. 77a).¹¹ On the other hand, there is no necessary implication that the 1854 treaty also abrogated the residual off-reservation hunting, fishing, or gathering rights of the Band.

It is well settled that tribal *use* rights—including hunting and fishing—may subsist in areas as to which title and rights of occupancy have been ceded. See, e.g., *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658 (1979); *United States v. State of Michigan*, 653 F.2d 277 (6th Cir. 1981), cert. denied, 454 U.S. 1124 (1981). Indeed, the Wisconsin Supreme Court has recognized off-reservation fishing rights in Lake Superior on behalf of the Chippewas, stemming from the same set of treaties involved in this case. *State v. Gurnoe*, *supra*, 53 Wis. 2d 407-409, 192 N.W.2d at 900-901. The Michigan Supreme Court has reached a similar conclusion in construing parallel treaties of the same time period with Chippewa and Ottawa Indians in Michigan. *People v. Le Blanc*, 399 Mich. 31, 248 N.W.2d 199 (1976); accord, *United States v. State of Michigan*, *supra*.

The court of appeals' conclusion that the Band's right to hunt and fish on unsettled land outside the boundaries of the reservation was not disturbed by the 1854 treaty is supported by the economic circumstances and subsequent activities of the Band at the time. The Chippewas were heavily dependent on hunting and fishing as their means of livelihood. As

¹¹ In the document setting forth the Band's selections of land to comprise the Lac Courte Oreilles Indian Reservation, the Band's headmen agreed "to use all our authority and influence to induce our people to abandon the lands sold or ceded to the United States by us and our fathers, and to rest with us upon the lands selected by us and described within our reservation and homes" (J.S. App. 80a).

the court of appeals noted (J.S. App. 49a), the Chippewas' way of life required that they be able to roam throughout the ceded territories. Cf. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918). The Wisconsin Supreme Court expressly relied on this factor when it determined that the Chippewas retained off-reservation fishing rights under the 1854 treaty. *State v. Gurnoe*, *supra*, 53 Wis. 2d at 409, 192 N.W.2d at 901. Significantly, after the treaty and the establishment of a reservation, members of the Chippewa Tribe continued to hunt and fish in unsettled areas throughout northern Wisconsin (J.S. App. 15a).

The court of appeals properly and carefully examined the treaty and the historical evidence surrounding it, and concluded that the Band retains off-reservation hunting, fishing, and gathering rights on public lands in northern Wisconsin. It reached a conclusion consistent with that of the Wisconsin Supreme Court, and similar to that of the Michigan Supreme Court and the Sixth Circuit construing similar treaties with the Chippewa in Michigan. Although other conclusions might be reached on the evidence, there is no reason for this Court to engage in plenary review of this essentially fact-bound issue.¹²

¹² The State argues that the decision below conflicts in principle with this Court's canons of interpretation of Indian treaties, because the court applied "a rule that the only consideration in treaty interpretation is the 'understanding' of the Indian parties to the treaty" (J.S. 9). This contention is without merit. The court of appeals considered the historical record as a whole, and correctly applied this Court's rule that an Indian treaty "must * * * be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 676 (1979).

4. The State has asked this Court in the alternative to consider its papers as a petition for a writ of certiorari (J.S. 2). We submit the same reasons that support summary affirmance argue for denial of certiorari. Moreover, if the plea for review is addressed to the Court's discretion, we believe it should be rejected as premature. The court of appeals has remanded the case to the district court for further consideration of the permissible scope of state regulation. The State makes much of the so-called "practical effect" (*id.* at 16) of the court of appeals decision, claiming that Wisconsin's fish and game resources "may decline substantially as a tourist or recreation attraction * * * [because the] Chippewa * * * can potentially hunt and fish the resources down to barely self-sustaining levels" (*id.* at 18). There is no basis for such a claim at this stage in the litigation. On remand, the State will have an opportunity to present its argument as to the scope of regulation over the Band's reserved rights necessary for the conservation of its natural resources (J.S. App. 52a; see *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 175-177 (1977); *Puyallup Tribe v. Washington Game Dep't*, 391 U.S. 392, 398 (1968)).

CONCLUSION

The appeal should be dismissed in part for lack of jurisdiction and in other respects affirmed. Considering the appeal as a petition for certiorari, such petition should be denied.

Respectfully submitted.

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SEPTEMBER 1983

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ALEXANDER L. STEVAS,
CLERK

Case No. 83-6

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

CARROLL D. BESADNY, ET AL.,
Appellants,

v.

LAC COURTE OREILLES BAND OF LAKE
SUPERIOR CHIPPEWA INDIANS, ET AL.,
Respondents.

STATE OF WISCONSIN, a sovereign state,
and SAWYER COUNTY, WISCONSIN,
Appellants,

v.

UNITED STATES OF AMERICA,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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August 1983

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Case No. 83-6

IN THE

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CARROLL D. BESADNY, ET AL.,
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ON APPEAL FROM THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**APPELLANTS' BRIEF IN OPPOSITION
TO MOTION TO DISMISS OR AFFIRM**

**I. The Motion To Dismiss Should Be
Denied.**

The appellees, Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al. (hereafter, "the tribe" or "the LCO Band"), seek dismissal of this appeal on the grounds that the Seventh Circuit Court of Appeals did not declare a Wisconsin statute invalid, and that the decision below is not final. Neither assertion has merit.

Although the Seventh Circuit Court of Appeals spoke in terms of the existence or nonexistence of treaty rights, rather than the validity or invalidity of Wisconsin Statutes, the effect of its judgment is to hold sec. 29.09(1), Wis. Stats., invalid.^{1/} That statute prohibits hunting, trapping, or fishing without a license, restricts the issuance, transfer, and possession of licenses, and concludes: "Indians hunting, fishing or trapping off Indian reservation lands are subject to this chapter." We ask this Court to take judicial notice that "this chapter" — ch. 29, Wis. Stats. (1981-1982) — is titled "Fish and Game" and regulates hunting, fishing, trapping, and gathering throughout Wisconsin, by means of 131 separate laws.

The LCO Band specifically sought a judgment declaring sec. 29.09(1), Wis. Stats. (1971), unconstitutional (Amended Complaint, A-Ap. 191). The Seventh Circuit's declaration of continuing rights to hunt, fish, and gather throughout the lands ceded in 1837 and 1842 necessarily invalidates sec. 29.09(1), Wis. Stats., by virtue of this Court's most basic holdings on state regulation of treaty hunting and fishing rights. The license requirement in sec. 29.09(1), Wis. Stats., is invalid as to Chippewa, under *Tulee v. State of Washington*, 315 U.S. 681 (1942). In *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658, 681-82, n. 25 (1979) (hereafter, "*Fishing Vessel*"), this Court distinguished the State's usual police power from its power over hunting and fishing by Indians. Applying those statements to the present case, the LCO Band is now guaranteed "more than simply the 'equal opportunity' along with all of the citizens of the State to catch fish. ..." Section 29.09(1), Wis. Stats., purports to give Indians only an "equal opportunity" to harvest the State's natural resources. Although ch. 29, Wis. Stats., may subject nontreaty fishermen "to

^{1/}Section 29.09(1), Wis. Stats., is printed in full at page 182a of the Jurisdictional Statement Appendix (hereinafter, "A-Ap. ") of the appellants (hereinafter, "the State").

any reasonable state fishing regulation serving any legitimate purpose, treaty fishermen are immune from all regulation save that required for conservation." 443 U.S. at 682. The court of appeals did not have to declare sec. 29.09(1), Wis. Stats., invalid in so many words; full or partial invalidity necessarily follows from holdings described in *Fishing Vessel*.

By contrast, in *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), this Court doubted there was a real holding of invalidity, because the trial court considered the merits of the case only to grant preliminary injunctive relief, before trial of the merits. The procedural facts of *Dusch v. Davis*, 387 U.S. 112 (1967), are closer to this case, although the decision does not expressly address appealability. The plaintiff attacked a state law as unconstitutional, and the district court upheld the law. The court of appeals' reversal of the district court judgment *in effect* held the statute unconstitutional, and this Court proceeded to the merits under 28 U.S.C. sec. 1254(2).

The requirement of a "final" judgment, if there is such a requirement,^{2/} serves the same basic purposes as the requirement of a reasoned, on-the-merits declaration of invalidity: it avoids premature and piecemeal appeals. This Court has often pointed out that "a decision 'final' within the meaning of [the predecessor of sec. 1254(2)] does not necessarily mean the last order possible to be made in a case." *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152 (1964).^{3/} Because the definition of "finality" is often difficult, "the requirement of finality is to be given a 'practical rather than a technical construction.'" The "'inconvenience and costs of piecemeal

^{2/}In *El Paso v. Simmons*, 379 U.S. 497, 502 (1965), this Court stated that it had "questioned but never put to rest" authority indicating that sec. 1254(2) is available only for review of a final judgment.

^{3/}As noted by the tribe, Motion to Dismiss, n. 1, much of the applicable precedent on the definition of "finality" involves writs of certiorari, since the same considerations arise in both types of cases.

review” are to be balanced against “the danger of denying justice by delay.” *Id.*, at 152-53. This Court will review lower court rulings in a case not yet fully tried, where the ruling is “fundamental to the further conduct of the case.” *Id.*, at 153.

There would be *no* “further conduct” of this case, if this Court were to reverse the court of appeals on the “fundamental” issue of the existence of the disputed treaty rights. If the State is entitled to such a reversal, it would be substantially injured by delaying that ruling until after full trial of the reasonableness and necessity of all the State’s hunting and fishing laws, as applied to hundreds of species of fish, game, and plants, in an area of about 15 million square miles. The certiorari cases cited at page 2 of the State’s Jurisdictional Statement strongly support a holding that “finality” is no bar to present consideration of this appeal.

II. The Motion To Affirm Should Be Denied.

A. *The Seventh Circuit’s construction of the relevant treaties conflicts with decisions of this Court.*

The LCO Band argues, in support of its Motion to Affirm, that the Seventh Circuit correctly applied settled rules for construction of Indian treaties. In response, the State relies primarily on the arguments stated at pages 9-15 of its Jurisdictional Statement. This Court’s decisions have tempered a consistent respect for the understanding of the Indian parties, with equal respect for the separation of powers between the judicial and legislative branches of government. Federal courts are authorized to declare the meaning of treaties, but must leave to the legislative branch the rewriting of unfair or improvident terms. *United States v. Choctaw Nation*, 179 U.S. 494, 532 (1900); *DeCoteau v. District County Court for Tenth Jud. Dist.*, 420 U.S. 425, 449 (1975). When this Court has failed to specify that *ambiguous* or *technical* terms in a treaty must be construed as the Indians would have understood

them, it has achieved the same result by cautioning that the clear meaning of a treaty cannot be ignored, to remedy what the court considers injustice or improvidence. By either method, this Court has sought to carry out the Indians' *reasonable* understanding of a treaty.

The tribe asserts that the Seventh Circuit "utilized all the appropriate rules of construction." The court of appeals acknowledged various aids to construction,^{4/} but analyzed the evidence from the single standpoint of "the Indians' understanding." The court of appeals also borrowed at length from the district court's meticulous statement of the massive body of evidence in this case. 700 F.2d at 344-49. That does not change the overall effect of the court's analysis, which is to hold that legislation affecting Indians shall be interpreted as the Indian parties understood them, period.

*B. The court of appeals violated this
Court's clear standards for review
of a summary judgment.*

These consolidated cases were presented to the court of appeals from rulings on cross-motions for summary judgment. To apply the rules for summary judgment review correctly, the case must be viewed as three distinct rulings, two of which favored the tribe in the district court, and one which favored the state.

The district court ruled *against* the State on the meaning of the conditional use and occupancy clauses in the 1837 and 1842 Treaties, and on the legal effect of the 1850 removal order. The court ruled in favor of the State on the ultimate issue of relinquishment of the off-reservation use rights in the 1854 Treaty.

The Seventh Circuit's misapplication of the summary judgment review standard facilitates its later errors on the effect of the 1854 Treaty. The tribe's assertion of the

^{4/}*Lac Courte Oreilles Band, etc. v. Voigt* (hereinafter, "*LCO Band*"), 700 F.2d 341, 351 (7th Cir. 1983).

standard for appellate review of a summary judgment (Motion to Affirm, page 8) is incomplete. The prevailing party must also establish that it is entitled to judgment as a matter of law. The state agrees that there is no genuine issue of material fact, but disputes the lower court's *legal* conclusions that: (1) the parties to the 1837 and 1842 Treaties intended to authorize removal only for cause, and for only two causes — "serious" misbehavior or expiration of a long time; and (2) the "misbehavior" documented in the record (*United States v. Bouchard*, 464 F. Supp. 1316, 1324-26 (W.D. Wis. 1978); A-*Ap.* 62a-66a) was not "serious." The factual inferences underlying those conclusions of law are obviously critical, especially where the record is voluminous and conflicting.

The state argued numerous inferences from the evidence recited in *Bouchard*: (*Bouchard*, at 1322-32, A-*Ap.* 56a-80a) that the legislative history of the two earlier treaties demonstrated unmistakable government intent to secure title to the Wisconsin Indian lands and to remove the Indians westward at such time as it was desirable, for *any* reason; that the 1837 Treaty Journal (*Bouchard*, at 1322-23, A-*Ap.* 57a-59a) revealed Chippewa determination to secure their tenure in Wisconsin for a period of years or on certain conditions, and persistent explanations by Commissioner Dodge that the government insisted on unconditional title to the lands; and that the variety of reasons urged by government officials and the Minnesota Legislature in support of removal (*Bouchard*, at 1325-26, A-*Ap.* 63a-66a) demonstrates *absolute* ignorance that the government had limited itself in 1837 and 1842 to removal only for "serious misbehavior" or after a term of years.

On the issue of "serious" misbehavior, the court of appeals totally ignored the State's reasonable theory that one purpose of the government's removal/isolation policy was to avoid *all* types of white-Indian conflict, whether brought about by illegal liquor, misunderstanding, or by the "fault" of the Chippewa. The court also

rejected argument from the record that the exemplary behavior of the bands residing on Lake Superior was *not* matched by the interior Lake Superior bands or by the Chippewa of the Mississippi.

C. *The court of appeals' analysis of the 1850 executive order conflicts with decisions of this Court.*

The tribe's arguments concerning the 1850 removal order (Motion to Affirm, part C) do not directly address the arguments on that subject in Part II of the State's Jurisdictional Statement, except to assert that no substantial matters are presented (Motion, page 9). The State disagrees, and comments additionally on the following points: At page 9, the Motion refers to "express representations" that removal would occur only for misbehavior. The *Bouchard* description of the 1837 (*Bouchard*, at 1322-23, A-Ap. 57a-60a) and 1842 negotiations^{5/} reveals that the evidence is anything but definitive on the subject of the representations, if any, made by the treaty commissioners, either as to reasons for, or likelihood of, removal. Also at page 9, the tribe describes the State as challenging the rules used to analyze "an Executive Order issued outside the scope of authorization contained in the treaties." A major dispute in this case is *whether* the 1850 order was outside the authorization of the earlier treaties.

The district court addressed the arguments reintroduced by the LCO Band at pages 10-12 of the Motion to Affirm. *See Bouchard*, at 1350-51, n. 17, A-Ap. 121a-123a. In addition to that reasoning of the district court, the State points out that the removal order *was* carried out, to the extent that some 3,000 out of 5,000 Chippewa (*Bouchard*, at 1326, n. 6, A-Ap. 67a) were removed to Minnesota (*Id.*, at 1329, A-Ap. 72a-74a).

^{5/}*Bouchard*, at 1324, Commissioner Stuart was instructed that general removal from the area would not take place for a "considerable time"; and page 1327, June 30, 1850 letter of Chief Hole-in-the-Day, and January 21, 1851 letter by the Secretary of the American Board of Commissioners for Foreign Missions, A-Ap. 60a-62a, 67a-69a.

The tribe's arguments (Motion to Affirm, pages 12-13) concerning the *res judicata* effect of *Mole Lake Band, et al. v. United States*⁶ / have been addressed in Part IV of the State's Jurisdictional Statement. The State reiterates that Wisconsin was invited to be, and was, a full party to the *Mole Lake* proceedings.

D. *The Seventh Circuit analysis of the nature of the treaty rights at issue, and the requisites for abrogating them, conflicts directly with decisions of this Court.*

The Seventh Circuit's errors on this subject are the most grievous of those presented.⁷ The tribe asserts that this Court has always refused to abrogate treaty-reserved rights of use by implication. This Court has repeatedly stated, even in cases involving "permanent" reservations established by treaty, that rights reserved by treaty can be abrogated by express language, or upon a "clear showing of intent" (presumably less than express statement), or that abrogation will not be "lightly implied" (indicating, inescapably, that some other kind of implied abrogation is permissible). See *Wilkinson & Volkman, Judicial Review of Indian Treaty Abrogation*, 63 Cal. L.R. 601, 623-24 (1975); *DeCoteau v. District County Court*, 420 U.S. 425, 444 (1975); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586-87 (1977). Whether a single case of implied abrogation of treaty-reserved use rights can be found, is less significant than this Court's repeated

⁶/139 F. Supp. 938, 134 Ct. Cl. 478 (1956), *cert. denied*, 352 U.S. 892 (1956), hereafter, "*Mole Lake*."

⁷/It must also be remembered that reversal of the court of appeals on the underlying issues — meaning of the conditional use and occupancy clauses and validity of the 1850 removal order — would moot this last issue. If the 1850 Order was valid, it revoked all of the conditional rights the Chippewa possessed under the earlier treaties. *Bouchard*, at 1350-51 n. 17, A-App. 121a-123a. Implied abrogation of the 1837 and 1842 rights of the 1854 Treaty would be superfluous, in light of the very *express* abrogation in the 1850 Order.

statements that Congressional intent to reduce treaty-defined rights *may* be derived from surrounding circumstances and legislative history. The Seventh Circuit in this case has held that Congressional intent to extinguish use and occupancy rights, made conditional by treaty, may *not* be taken from surrounding circumstances and legislative history, but *must be express* (700 F.2d at 356, 365). Either we err in assuming that implied abrogation is possible under the "not lightly imputed" and "clear from surrounding circumstances" standards, or the Seventh Circuit's insistence on *express* abrogation conflicts with this Court's standards in such cases as *DeCoteau* and *Rosebud Sioux*.

The court of appeals insists that so-called aboriginal rights can be extinguished by implication, because they are unenforceable and not legal rights at all, 700 F.2d at 356, and that any right mentioned in a treaty, no matter how limited, cannot be extinguished by implication. We reiterate that: 1) this Court has been scrupulous not to abrogate so-called "aboriginal" rights without clear evidence of intent, and 2) cases distinguishing "recognized" from "aboriginal" rights require an element of *permanence* in "recognized" rights. Given the overwhelming evidence of the government's intent, not only to buy the Chippewa's lands, but to remove the Chippewa from Wisconsin within one or two generations, it cannot seriously be argued that the conditional use and occupancy rights were ever understood, by either side, to be permanent. The district court was correct in characterizing the conditional rights as "permissive." (*Bouchard* at 1347-48, 1351, A-App. 114a-117a, 125a-126a.)

Rights of use *can* be separate from occupancy, but the two are inextricably linked *in this case*. See *Bouchard* at 1359, A-App. 141-142a. Conditional use and occupancy clauses were put into treaties in anticipation that some later event would require the Indians to remove from the lands in question. The *raison d'être* for the conditional use and occupancy rights here ceased to exist when, in

the 1854 Treaty, the Chippewa secured the government's written promise that they would not have to remove from the reservations authorized by the treaty.

The district court's analysis of the clear intent behind the events of 1837 through 1854 (*Bouchard*, at 1352, 1358-61, A-App. 125a-127a, 139a-147a) was correct. For the foregoing reasons and those presented in the Jurisdictional Statement, the appellants request that the Motion to Dismiss or Affirm be denied.

Respectfully submitted,
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Case No. 83-6

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1983

CARROLL D. BESADNY, ET AL.,
Appellants,

v.

LAC COURTE OREILLES BAND OF LAKE
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Respondents.

STATE OF WISCONSIN, a sovereign state,
and SAWYER COUNTY, WISCONSIN,
Appellants,

v.

UNITED STATES OF AMERICA,
Respondent.

ON APPEAL FROM THE COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

**APPELLANTS' BRIEF IN OPPOSITION
TO SOLICITOR GENERAL'S
MOTION TO DISMISS IN PART OR AFFIRM IN PART**

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 MOTION TO DISMISS IN PART OR AFFIRM IN PART**

**I. The Motion To Dismiss In
 Part Should Be Denied.**

The Solicitor General (hereinafter, "the United States") seeks dismissal of the appeal numbered 79-1014 in the court of appeals, *United States vs. Wisconsin, et al.* (hereinafter, "*Ben Ruby*"), on the theory that the case was not

properly "in the court of appeals" for purposes of this Court's jurisdiction under 28 U.S.C. § 1254(2). The motion essentially argues that the appellants (hereinafter, "the State") were and are not aggrieved by the *Ben Ruby* decision, and that the State prevailed on all issues in that case.

In the Seventh Circuit and in this Court, the State is aggrieved by the district court's and court of appeals' holdings that the 1850 Executive Order was invalid, and did not revoke the Chippewa's reserved rights of use and occupancy. A decision and judgment may be ultimately favorable to a party, but contain a finding which seriously damages, or potentially damages, the party. *Moore's Federal Practice* articulates the issue: "Suppose, however, that the judgment gives the party the full relief which he has asked for, the entire sum claimed, say, ... but contains a finding which is adverse to him. May he appeal from the adverse finding?" *Moore's Federal Practice* (hereinafter, "*Moore's*"), Vol. 9, par. 203.06, pages 3-23 to 3-24. The treatise first proposes that a finding is not truly "adverse" unless it can form the basis for collateral estoppel in subsequent litigation, and continues:

Because, in the general view, a finding can form the basis for collateral estoppel only if it is necessary to the judgment, and because a finding adverse to an otherwise all-prevailing party will rarely

be necessary to the judgment, it is broadly stated that a party cannot appeal from a judgment entirely favorable to him. But not all courts agree that only a finding necessary to the judgment may form the basis for collateral estoppel. Perhaps for that reason the Supreme Court has held that a successful party is entitled to appeal from a decree which contains an unnecessary adverse finding to the extent of seeking reformation of the decree. The Fifth Circuit has gone further.

Id., page 3-24, footnotes omitted.

This Court has held, in a case also cited by the United States, that an appeal by a prevailing party may be permitted from an adverse ruling which is collateral to the judgment on the merits. The appellant must, however, retain such a stake in the appeal as to satisfy the requirements of Article III of the Constitution. *Deposit Guaranty Nat. Bank, Etc. v. Roper*, 445 U.S. 326, 334 (1980). In another case also cited by the United States, this Court upheld a "prevailing" party's right to have a decree reformed, to eliminate an unfavorable finding collateral to the judgment. *Electrical Fittings Corp., et al. v. Thomas & Betts Co., et al.*, 307 U.S. 241, 242 (1939).

The State's position in the Seventh Circuit is, alternatively, aptly described in *Moore's* as "conditionally aggrieved." *Moore's* Vol. 9, par.

203.06, page 3-25. Such a party is not aggrieved unless and until an appeal is taken by another. When the Lac Courte Oreilles (hereinafter, "LCO") Band appealed the *LCO Band vs. Voigt* decision to the Seventh Circuit, the district court's invalidation of the 1850 Executive Order (in both *Ben Ruby* and *LCO Band*) became far more menacing to the State. The State thus argued explicitly that, if the district court's ultimate ruling on the effect of the 1854 Treaty were reversed, the State was most clearly aggrieved by the Executive Order ruling. If the district or appeals courts had construed the Order as the State requested, The Chippewa's reserved use and occupancy rights would have been held revoked by express action of the Order, and not by implicit operation of the 1854 Treaty. To dismiss the State's cross-appeal would have deprived the State of a fair opportunity to challenge a most damaging ruling.^{1/}

^{1/} The Executive Order ruling was damaging to the State, regardless of any appeals by the Tribe or the United States. Invalidation of the Order changed the transactions of the 1854 Treaty from a grant of lands, from the United States to tribes who no longer had any rights whatsoever in Wisconsin, to a reservation by the Chippewa of continuing rights. By sole virtue of that conversion, the *LCO Band* now arguably fits within the *United States vs. Winans*, 190 U.S. 371, 381 (1905), rule of construction, that the 1854 Treaty must be seen as a grant of rights from the Indians, and a reservation of those rights not (footnote continued)

If the State's cross-appeal in *Ben Ruby* is to be dismissed solely for lack of a direct appeal by the United States, the *Ben Ruby* decision should be remanded, as in the *Electrical Fittings* case, for deletion of the damaging and unnecessary invalidation of the 1850 Executive Order.

II. The Motion To Affirm In Part Should Be Denied.

The United States argues that the 1850 Executive Order was invalid because it allegedly was not enforced. The factual premise of that argument is incorrect, as published reports in the record of this case indicate that some 3,000 out of 5,000 Chippewa (J.S.App. 67a) were removed to Minnesota (J.S.App. 72a-74a). However, this Court need not descend into that factual dispute, because the district court disposed of that argument appropriately on purely legal grounds. (J.S.App. 122a-123a.) The court reasoned that, if the order was valid and if it was not repealed, "it terminated the Indians' treaty right of permissive occupation. Whether the Indians actually complied with the order does not affect its legal status." (J.S.App. 122a, n.17) Acknowledging the Wisconsin Supreme Court's reference to the Order in *State vs. Gurnoe*, 53 Wis. 2d 390, 406-07, 192 N.W.2d 892 (1972), the district court "respectfully

granted. That ruling will undoubtedly be cited against the State, in other cases.

disagree[d]" with the state court's reasoning, and noted that the *Gurnoe* reference was dictum anyway. (J.S.App. 123a, n.17). The position advanced by the United States invites anarchy, if mere disobedience can nullify orders and laws.

The argument of the United States concerning the LCO Band's economic circumstances and post-treaty activities would divert this Court into factual disputes which miss the point of the legal issues pressed by the State. The Seventh Circuit gave the highest possible legal standing, ordinarily reserved for rights intended to be permanent, to rights which both parties had to understand as temporary. The court took a case (*U.S. vs. Winans*) which established only that rights of use can survive on patented lands, independent of rights of occupancy, and effectively converted it into a presumption that hunting and fishing rights are not incidents of occupancy, but separate rights requiring separate, express revocation. The court's holdings on issue after issue demonstrate a contortion of Indian treaty interpretation rules that violates precedent, logic and reason. Finally, as noted before (J.S. 26), the court's refusal to consider the actual treaty language defining the rights casts profound doubt on the premise that rights are defined most basically by the document(s) creating or confirming them.

The United States' arguments regarding prematurity of this case (Motion p. 16) are addressed at pages one to four of our brief

in opposition to the tribe's motion to dismiss or affirm. We therefore request that the pending motions be denied and the case set for briefing and argument.

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ON APPEAL FROM THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE STATE OF MICHIGAN
IN SUPPORT OF APPELLANTS' JURISDICTIONAL
STATEMENT

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BRIEF FOR AMICUS CURIAE STATE OF MICHIGAN
PURSUANT TO RULE 36.4
IN SUPPORT OF APPELLANTS' JURISDICTIONAL
STATEMENT

INTEREST OF AMICUS CURIAE

These cases involve construction of Indian treaties affecting lands principally in the State of Wisconsin, but also affecting territory within the States of Minnesota and Michigan. One of the issues raised in *Besadny v Lac Courte Oreilles Band, sub nom Lac Courte Oreilles Band v Voigt*, 700 F2d 341 (CA 7, 1983) (1a) and the chief one which amicus addresses, is

whether the Indian signatories to the 1854 *Treaty with the Chippewa* (161a) relinquished, or retained, hunting and fishing rights which had been reserved under 1837 and 1842 treaties in which lands had been ceded to the United States.

The laws of Michigan contain various restrictions on hunting and fishing which are similar to the Wisconsin statute which the Court of Appeals held conflicts with the 1837 and 1842 treaties with reference to off-reservation hunting and fishing activities by the Lac Courte Oreilles Band. In so holding, the Court of Appeals ruled that the reservation-establishing treaty of 1854 did not abrogate the privilege to hunt and fish guaranteed to the Chippewa Indians within lands ceded by them in the treaties of 1837 and 1842 (51a).

No Michigan-based Chippewa Bands were signatories to the 1837 treaty (150a), and no land within the State of Michigan was affected. Among the Lake Superior Chippewa Bands who were signatories to the 1842 treaty (156a) were three bands residing in the Upper Peninsula of the State of Michigan: Onlonagon (Ontonagon) (part of which band is now known as the Red Cliff Band in Wisconsin), Ance (L'Anse), and Vieux Desert (Lac Vieux Desert) (160a-161a). By the treaty of 1842 (156a-157a), the Chippewa ceded to the United States lands (1) in the northerly portion of Wisconsin adjoining the State of Michigan and Lake Superior (148a) and (2) in the western portion of the Upper Peninsula of Michigan (see Attachment 1 as to the Michigan cession). The greater mass of the land so ceded is in Michigan.

The three Michigan bands of the Lake Superior Chippewa were also signatories to the Treaty of 1854 (161a), by which lands solely within the territory of Minnesota were ceded to the United States. Under article 2, sections 1st and 6th (163a-

164a), the three Lake Superior Chippewa Bands from Michigan (who were among the signatories to the 1842 treaty) were granted reservations within previously-ceded land in the Upper Peninsula of Michigan. The 1854 treaty, by creating reservations from ceded lands, abandoned the removal policy underlying the 1837 and 1842 treaties, and abrogated hunting and fishing rights previously retained by the Indian signatories within lands ceded in the 1837 and 1842 treaties.

The three Michigan-based Lake Superior Chippewa Bands that were signatories to the treaties of 1842 and 1854 have a government-to-government relationship with the United States, and are known as the Keweenaw Bay Indian Community of L'Anse, Lac Vieux Desert and Ontonagon Bands of Chippewa Indians of the L'Anse Reservation, Michigan.

The Seventh Circuit's decision in this case, in misconstruing the 1854 treaty, may have a significant impact upon the ability of the State of Michigan to regulate off-reservation hunting and fishing by members of the Keweenaw Bay Indian Community, as well as other members of Wisconsin Chippewa bands who signed the 1842 treaty, within lands ceded by the 1842 treaty as modified by the Treaty of 1854. Although the Michigan Chippewa were not parties in the principal action, they were signatories to the 1854 treaty under which, the Seventh Circuit held, the Respondent Wisconsin Indian band did not relinquish the privilege to hunt and fish within any lands ceded under the 1837 and 1842 treaties which have not passed into private ownership (52a).

SUMMARY OF ARGUMENT

THE RESERVATION-ESTABLISHING 1854 TREATY MODIFIED AND SUPERSEDED CERTAIN PROVISIONS OF THE 1837 AND 1842 TREATIES IN WHICH THE INDIANS STIPULATED FOR CERTAIN USE PRIVILEGES ON CEDED LANDS UNTIL THE INDIANS WERE REQUIRED TO REMOVE FROM SUCH CEDED LANDS.

In Indian treaty matters, actions of Congress, whether by treaty or legislation, affecting the same tribe or group of Indians, are to be construed *in pari materia*. See, eg, *United States v Mitchell*, 445 US 535, 542 (1980). While the Court of Appeals accepted the District Court's analytic framework that the treaties of 1837, 1842 and 1854 were *in pari materia* (47a-48a), the Court of Appeals, contrary to the District Court, concluded that the parties to the 1854 treaty did not intend to extinguish the use privileges within lands ceded pursuant to the two earlier treaties (*Id.*) Amicus agrees with Appellants that the District Court correctly discerned "the parties' intention that the 1854 treaty would extinguish the general Indian claim of a right to occupy, and hunt, fish and otherwise obtain food" (146a) on the lands previously ceded in 1837 and 1842. *United States v Bouchard*, *United States v Ben Ruby & Sons, et al* and *Lac Courte Oreilles Band of Lake Superior Chippewa Indians, et al v Voigt, et al*, 464 F Supp 1316, 1361 (WD Wis, 1978) (146a). It is the parties' intention, and not solely that of the superior side, that must control any attempt to interpret treaties with the Indians. *Washington v Washington State Commercial Passenger Fishing Vessel Assn*, 443 US 658, 675-676 (1979).

"[T]he treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.'" *Id.* at 676.

This Court has also stated:

“A canon of construction . . . [that is,] the rule by which legal ambiguities are resolved to the benefit of the Indians . . . is not a license to disregard clear expressions of tribal and congressional intent.” *DeCoteau v District County Court*, 420 US 425, 447 (1975).

Finally, as stated in F. Cohen, *Handbook of Federal Indian Law* (1982 Ed.) at 468:

“Indian hunting and fishing rights can be terminated in the same way as other treaty rights. They can be extinguished by the terms of the treaty itself, by Act of Congress, or by a subsequent inconsistent treaty. Congressional intent to abrogate or modify an Indian treaty, however, is not lightly imputed.”
(footnotes omitted)

Cf. United States v Sante Fe Pacific RR Co, 314 US 339, 357-358 (1941).

It is clear in this case that the District Court, after extensive review of the facts and circumstances surrounding the three treaties, did not “lightly impute” that the 1854 treaty abrogated the use privileges reserved in the prior two treaties. Instead, the District Court found that the evidence “strongly implies the parties’ intention” (146a) that the latter treaty extinguished use privileges stipulated for in 1837 and 1842. Contrary to the District Judge’s conclusion, the Court of Appeals held that “[n]othing in the record compels the conclusion” that the Lac Courte Oreilles Band understood, and that the government intended, that the 1854 treaty abrogated the use rights recognized in the prior treaties (49a). Amicus agrees with the conclusion reached by the District Court, that the record evidence

strongly indicated the finding that the Indians understood, and the government intended, in the 1854 treaty to extinguish prior use rights on ceded lands.

The 1854 reservation-established treaty formally abandoned, and reversed, the Indian removal policy which was the impetus behind the two earlier treaties, the attempted effectuation of such policy by the 1850 removal order leading to the 1854 treaty negotiations.

1. TREATIES OF 1837 AND 1842

The 1837 Treaty with the Chippewa, 7 Stat 536 (150a), concluded at St. Peters in the Wisconsin territory, ceded, in exchange for the payment of annuities and satisfaction of certain debts, land in the territories of Wisconsin and Minnesota. No Chippewa from the State of Michigan were signatories to the treaty, and no Michigan land was affected. Article 5 of the 1837 treaty provides:

"The privilege of hunting, fishing, and gathering the wild rice, upon the lands, the rivers and the lakes included in the territory ceded, is guarantied [sic] to the Indians, during the pleasure of the President of the United States." (153a).

The circumstances surrounding the making of this treaty are set forth in the opinion of the District Court (56a-60a) and that of the Court of Appeals (3a-7a).

In the 1842 Treaty with the Chippewa, 7 Stat 591 (156a), signed at La Pointe in Wisconsin, lands in the western portion of the Upper Peninsula of the State of Michigan (see Attachment 1) and lands within the territory of Wisconsin (148a) were ceded by Chippewa signatories from the affected lands in

Michigan and Wisconsin, as well as from the territory of Minnesota. Article II of the treaty pertinently provided that "[t]he Indians stipulate for the right of hunting on the ceded territory, with the other usual privileges of occupancy, until required to remove by the President of the United States" (157a). Article III states:

"It is agreed by the parties to this treaty, that whenever the Indians shall be required to remove from the ceded district, all the unceded lands belonging to the Indians of Fond du Lac, Sandy Lake, and Mississippi bands, shall be the common property and home of all the Indians, party to this treaty." (157a-158a).

The unceded lands belonging to the Fond du Lac, Sandy Lake, and Mississippi bands were all located within the territory of Minnesota, to which the Michigan and Wisconsin Chippewa who had ceded lands in the treaty would be required to locate if removal was ordered by the President.

Further salient provisions of the 1842 treaty (Article IV) (158a) included the payment of annuities, benefits, and the satisfaction of certain Indian debts. The treaty did not provide for the place where, and time when, annuity payments would be made to the Indians. Additional circumstances concerning the treaty are set forth in the opinion of the District Court (58a-62a) and in that of the Court of Appeals (5a-6a).

2. EVENTS FOLLOWING THE 1842 TREATY

The courts below noted that white settlement greatly increased within the ceded lands following the signing of the 1842 treaty (7a; 62a). The 1846 Report to the Commissioner of Indian Affairs suggested that the Chippewas be removed to the land set apart for them west of the Mississippi (63a). In the summer of 1847, two government agents unsuccessfully at-

tempted to secure Chippewa agreement to a resettlement plan (7a; 64a). During this time, the Commissioner of Indian Affairs continued to recommend removal of the Indians to the unceded Chippewa lands in Minnesota described in Article III of the 1842 treaty (8a; 63a-66a). In February of 1849, there was introduced in Congress a petition of the Lake Superior Chippewa seeking a "donation of 24 sections of land, covering the graves of our fathers, our sugar orchards, and our rice lakes and rivers, at seven different places now occupied by us as villages" (66a). The petitioners further stated that in addition to seeking the land for the purposes set forth, they also desired the land "for permanent cultivation and permanent homes." (66a). Further, in October of that year, the Legislative Assembly of the Minnesota territory requested the President to remove the Chippewas to another unsettled area. (*Id.*)

3. THE 1850 EXECUTIVE ORDER

Following the repeated urgings of the Commissioner of Indian Affairs, and that of the Secretary of the Interior, the President issued, on February 6, 1850, an executive order specifically revoking "[t]he privileges granted temporarily to the Chippewa Indians" by Article 5 of the 1837 treaty, and by the second article of the 1842 treaty. (8a-9a, 67a). In 1850, a further attempt to effect removal occurred when the place for payment of annuities was changed from La Pointe, Wisconsin, to Sandy Lake in the territory of Minnesota, the "removal" area, which resulted in hardship and death to many Indians (10a-11a; 70a-71a). As the result of an agreement between the Indians and the government Indian agent, the place for payment of the 1851 annuities was changed to Fond du Lac, Minnesota. The Indians again found poor provisions, and Chippewa Chief Buffalo requested that all future payments be made at La Pointe (12a; 71a-73a). A delegation of Chippewa Chiefs and braves travelled to Washington to meet with President Fill-

more regarding the removal order. Benjamin Armstrong accompanied the Indians as their interpreter, and in subsequently reporting what took place, stated that the Chiefs met with President Fillmore. As stated by the Seventh Circuit:

"According to Armstrong, on June 12, 1852, Chief Buffalo dictated a memorial to President Fillmore. He again expressed his understandings that treaty annuities were to be paid at LaPointe and that the Indians were to be permitted to remain on their lands for 'one hundred years to come.' The Chief beseeched the President and his agents to honor the Treaty of 1842 as the Indians understood it. President Fillmore told the delegation that he would countermand the Removal Order of 1850 and that annuity payments would henceforth be made at LaPointe. He gave Chief Buffalo a written instrument explaining these promises. The delegation returned home. There is apparently no current record of the President's explicit contravention of the removal order." (12a).

Armstrong reported that the 1852 annuity payments were made at La Pointe in mid-October, and that the President's letter was explained to the Indians there convened:

"Chief Buffalo told them there was yet one more treaty to be made with the President, 'and he hoped in making it they would be more careful and wise than they had heretofore been and reserve a part of their land for themselves and their children.'" [Quoted from B. G. Armstrong, *Early Life Among The Indians*, p 32 (1892).] (14a; 74a).

In 1853 and 1854, the annuity payments were made at La Pointe. (74a). In his December 14, 1853 report, Wisconsin Indian agent Gilbert reported that the "'great terror'" of the Indians was the Removal Order, and that they would "prob-

ably 'sooner submit to extermination than comply with it'", additionally reporting that the Indians and the whites in the area were living peacefully and harmoniously with one another. *Id.*

The Court of Appeals agreed with the District Court that the removal order of 1850 was invalid (44a) as the Indian signatories to the Treaty of 1842 had been assured that removal would be ordered only if they misbehaved. The courts found the Indians had not. Appellants' *Jurisdictional Statement* addresses at length the 1850 removal order whose issuance, it is contended, extinguished any permissive occupancy and use privileges on the ceded lands. Assuming, for the sake of argument, that the 1850 removal order was unauthorized, amicus believes it is nevertheless extremely relevant to the understanding of the circumstances of the 1854 treaty. The executive order indicates the government's attempted consummation of the then-prevalent and long-standing presidential and congressional policy of Indian removal, as provided for in Article 5 of the 1837 treaty and Article II of the treaty of 1842 (3a).

In other words, the treaties of 1837 and 1842, premised on the policy of removing Wisconsin and Michigan Chippewa onto their unceded lands in the territory of Minnesota, granted to the Chippewa use privileges on ceded lands until their contemplated removal was ordered. In 1850, removal was ordered, but shortly thereafter removal efforts were held in abeyance, and then abandoned, by the reservation-establishing Treaty of 1854 which, in effectively overruling the 1850 executive order, also modified and superseded provisions of the two earlier treaties upon which the removal policy was premised. Thus, the Treaty of 1854 abandoned the removal policy—to which use privileges on ceded lands until removal had been tied. As removal was abandoned,

so were use privileges extinguished on any non-reservation lands (except to the extent that Chippewa custom and geographic location of particular reservations indicate otherwise).

4. THE TREATY OF 1854

The 1854 Treaty with the Chippewa, 10 Stat 1109 (161a) concluded at La Pointe in the State of Wisconsin, ceded to the United States, in exchange for the establishment of reservations in Wisconsin, Michigan, and the territory of Minnesota and payment of annuities in satisfaction of certain debts, lands exclusively located in Minnesota (14a; 142a-143a). In exchange for the Minnesota land cession, reservations were established for the signatory tribes (or provisions made for their establishment) within the seven separate paragraphs of Article 2 (163a-164a).

Paragraph 3d of Article 2 provided for the establishment of a reservation for the Lac Courte Oreilles Tribe; paragraph 1st and paragraph 6th of Article 2 similarly established reservations for the three Michigan-based Chippewa Bands who signed the 1854 (as well as the 1842) Treaty. Since no Wisconsin or Michigan lands were ceded to the United States in the 1854 Treaty, it is apparent that the reservation land granted by the United States to the Wisconsin and Michigan-based Chippewa in the 1854 Treaty came from lands previously ceded to the United States by the Indians in the treaties of 1837 and 1842. Since only lands within the territory of Minnesota were ceded in the 1854 Treaty, it would appear that signatures of Minnesota-based Chippewa only would be required, and not signatures of other Chippewa bands residing in Wisconsin and Michigan. Wisconsin and Michigan-based Chippewa were signatories to the 1854 Treaty because these Chippewa resolutely insisted that reservations be established for them as permanent homes (78a), as a first

condition of any further treaty, and for the additional reason that material provisions of the 1837 and 1842 treaties were modified and superseded by the 1854 Treaty.

It must again be emphasized that under Article 5 of the 1837 Treaty, and Article II of the 1842 Treaty, the Wisconsin and Michigan Chippewa signatories reserved use rights, including hunting and fishing, on the ceded territory, until required to remove by the President. Under Article III of the 1842 Treaty (under which treaty Wisconsin and Michigan lands were ceded), it was provided that should removal be ordered by the President, the Wisconsin and Michigan-based Chippewa would be required to locate within unceded lands in the territory of Minnesota. To cancel this provision, the 1854 Treaty, Article 11, pertinently stated that

“The Indians shall not be required to remove from the homes hereby set apart for them. And such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein, until otherwise ordered by the President.”

With respect to that portion of Article 11 providing that “the Indians shall not be required to remove from the homes hereby set apart for them”, the language clearly refers to the reservations established in Article 2 of the Treaty, which established: (1) reservations from lands in Wisconsin and Michigan which were ceded in the 1837 and 1842 treaties; and (2) reservations in Minnesota from land ceded in the 1854 treaty itself. Given the fact that the 1842 treaty did not affect lands within the territory of Minnesota, and that the Treaty of 1854 ceded to the United States lands solely within Minnesota, it is also clear that the language of Article 11 quoted above—“[a]nd such of them as reside in the territory hereby ceded, shall have the right to hunt and fish therein,

until otherwise ordered by the President”—solely refers to the Minnesota lands ceded by the 1854 Treaty.

Thus, while the 1854 Treaty resulted in the cession of lands within the territory of Minnesota to the United States, hunting and fishing privileges on lands ceded in that treaty were solely guaranteed to Minnesota-based Chippewa. Most significantly, the prior removal policy underlying the 1837 and 1842 treaties, to which hunting and fishing use rights on ceded lands had specifically been tied for the Wisconsin and Michigan Chippewa signatories—with provision in the 1842 treaty for removal to the territory of Minnesota—was nullified by Articles 2 and 11 of the 1854 treaty which established reservations on previously-ceded lands. Article 11 specifically guaranteed that they “shall not be required to remove from the homes set apart for them”.

Therefore, the 1854 Treaty both modified and superseded the removal provisions of the 1837 and 1842 treaties to which hunting and fishing rights were specifically annexed. It is contended, as concluded by the District Court, that the establishment of reservations within previously-ceded lands extinguished the concomitant, conditional use privileges which were retained only until removal was ordered. Since the removal provision was specifically abandoned by Article 11, in conjunction with Article 2, of the 1854 Treaty, the use privileges existing until removal was ordered were extinguished as to non-reservation lands (except to the extent that Chippewa custom and the particular geographic location of reservations indicate otherwise; *eg*, *State v Gurnoe*, 53 Wis 2d 390; 192 NW2d 892 (1972); *People v Jondreau*, 384 Mich 539; 185 NW2d 375 (1971); Michigan Attorney General Opinion 5714, 1979-1980 Biennial Report, p 800 (May 29, 1980)).

Several other provisions of the 1854 Treaty testify to its modifying and superseding effect on the treaties of 1837

and 1842. Under the two earlier treaties, there was no specification of the place where annuities were to be paid the Chippewa. In seeking to collect their annuities under the 1842 Treaty, the Chippewa sought payment at the customary place, La Pointe in Wisconsin. Despite the fact that no lands outside the territory of Minnesota were ceded under the 1854 Treaty, Article 11 thereof provided that all annuity payments to the Chippewa would thereafter be made at L'Anse (Michigan), La Pointe (Wisconsin), Grand Portage (Minnesota) and on the St. Louis River (Minnesota). The annuity payment provision, located in the same article of the 1854 Treaty which guaranteed against removal of the Chippewa from reservations established under Article 2, also acted as an explicit abrogation of that aspect of the removal policy wherein an annual trek to Sandy Lake for payment of provisions had been required in 1850 and 1851. The District Court quoted in full the February 27, 1854 Memorial of the Wisconsin Legislature, which was sent to the President and Congress, relating to the Chippewa Indians of Lake Superior (75a-76a). The Memorial requested that the President rescind the 1850 removal order, that annuity payments (under the 1842 Treaty) be made at La Pointe and encouraged the federal government to provide for the "permanent settlement" (76a) of the Wisconsin Chippewa within the State.

Prior to this Memorial, the Michigan Legislature had twice passed joint resolutions relative to the Chippewa Indians, requesting that they be allowed to permanently settle in the State of Michigan. On April 7, 1851 (1851 Public Laws, Joint Resolution No. 15, at pp 258-259) (Attachment 2) the Michigan Legislature:

"... hereby request the government of the United States to make such arrangements for said Indians as they may desire, for the permanent location in the northern part of this State, under such provisions in regard to schools,

churches, agricultural and mechanical arts, as will the best promote their present and future welfare, and adjust all matters of right and equity that may not be in dispute between said Indians and said government, in a spirit of just liberality.”

On February 9, 1853, Joint Resolution No. 17 (1853 Public Laws, pp 203-206) (Attachment 3) was passed relative to the Lake Superior Chippewa, and whose text reads in relevant part:

“Whereas, By articles of treaty made and concluded at La Pointe, of Lake Superior, October fourth, eighteen hundred and forty-two, between the United States and the Chippewa Indians of the Mississippi and Lake Superior, the country occupied by said Indians was ceded to the United States; and in consideration of said cession, the United States engaged ‘to pay to the Chippewa Indians of the Mississippi and Lake Superior, annually, for twenty-five years, twelve thousand five hundred dollars in specie; ten thousand five hundred dollars in goods,’ and other payments, and to provide certain officers, schools, &c., for said Indians;

“And whereas, . . . said annuities to that portion of said Chippewas residing in the Lake Superior district have heretofore, until about two years past, been paid at La Pointe, of Lake Superior, and for the past two years have not been paid to said Chippewas of Lake Superior in consequence of their great distance from the present point fixed for said payments, at Sandy Lake, near the head waters of the Mississippi, which point they are unable to reach, and return to their homes on Lake Superior before the rigors of winter have barred their passage;

"And whereas, It is believed the cause of the change in place of payment on the part of the United States, is owing to the desire of the general government to hasten the removal of said Chippewas of Superior, to lands not ceded in said treaty, . . . ;

"And whereas, That portion of said Chippewas embraced in said treaty, now settled at L'Ance and vicinity on Lake Superior, in the State of Michigan, who have been unable to receive their share of said annuities for the past two years, for the reasons aforesaid, now number upwards of one hundred families; have abandoned the wandering habits and war-like pursuits which characterize the red men of the forest, for the peaceful occupations and christian precepts of the white man; have learned our language and our laws, and cordially yield obedience thereto; have accepted the boon tendered to them by the people of the State of Michigan, on the adoption of its constitution, by disbanding their organization in tribes, and becoming electors under that constitution; have exercised the right of suffrage in a manner which shows their intelligence and discrimination, and their fitness for the enjoyment of the high privileges of American citizens; have purchased and become the actual and legal owners of tracts of land to the amount of about one thousand acres, upon which they now reside, and much of which they have cultivated and improved; have learned and are now in the constant practice of the arts of husbandry and the mechanic arts; raise a considerable amount of stock, grains and vegetables, which have become indispensable to the operatives in the mining districts of Lake Superior; have established schools, in which the English language, and the ordinary routine of an English education are taught to their youth; have erected school houses and churches, and have become moral, industrious, sober and useful inhabitants, having

an ardent desire to remain in peace and social harmony with the citizens of the Upper Peninsula of Michigan, and there to receive the share to which they are entitled under the treaty aforesaid;

"And whereas, The citizens residents in their vicinity unanimously desire that the Chippewas aforesaid should remain among them, and have petitioned, in accordance with the desire of said Indians, that their annuities should be paid them at L'Ance, on Lake Superior;

"And whereas, The payment of said annuities at that place can be made more economically to the General Government than at Sandy Lake, and requiring said Indians to go from their homes at L'Ance to the place of payment, would tend not only to cause them great loss of time, and much embarrassment, delay, and expense, but would also tend to efface from their minds the salutary precepts of their instructors, and to lead them from their present habits of sobriety, temperance, and industry, to their original wandering habits, and to irregularities and intemperance, from the contaminating influence of the example of their red brethren, who are not, like them, improved in the arts and virtues of civilization;

"And whereas, By requiring said Indians permanently to remove from their residence, they would be obliged to abandon their farms, school houses, and churches, and their instructors would be brought into the vicinity of their natural enemies, the Sioux, and into permanent contact with their brethren who have as yet made little improvement; and such removal would evidently tend to degenerate them, and cause them to return to their former state, and to the pursuits of savage life;

“*And whereas*, It is understood that the general government has dispensed with the farmer, blacksmith, carpenter, and school, and sold the oxen heretofore provided for said Indians, under the treaty aforesaid, and for the purpose, as is believed, to hasten their removal from their present residence; which provisions in said treaty are now not only useful but necessary for the continued improvement of said Indians;

“*And whereas*, In the opinion of the Legislature, the payment of said annuities, and the restoration of said officers, school, and oxen, without requiring the removal of said Indians, is manifestly equitable, would tend to bind them with the strong cords of love and affection to the white population, to our government, to the cause of education, and the divine precepts of morality and christianity, which are the foundation of our political strength, preserving uncontaminated by ignorance and vice the purity of our political principles, and the permanency of our free institutions, and would tend, in some small degree, to mitigate the wrongs of an injured race, second to none in the exalted attributes of magnanimity, generosity, and gratitude, but whose destiny has seemed to be to retire at the approach of enterprise, and disappear as civilization advances; therefore

“*Resolved by the Senate and House of Representatives of the State of Michigan*, That our Senators and Representatives in Congress be earnestly requested to make the necessary applications, and to urge the passage of such laws as may be requisite to provide for the payment to the Chippewa Indians, now residing at L’Ance and vicinity, on Lake Superior, of their pro rata amount of the annuity guarantied to them by the treaty made between the United States and the Chippewa Indians, October fourth, eighteen hundred and forty-two, and

that they may not be required to remove from lands selected, purchased, and owned and occupied by them, or from their present residence, at and near L'Ance aforesaid; and that the annuities now due them, and hereafter to become due to them, may be paid at L'Ance, on Lake Superior; and the offices of farmer, blacksmith, and carpenter, and their school and oxen be restored to the Indians aforesaid.

"Resolved further, That the Governor of this State be requested to forward copies of these resolutions to our Senators and Representatives in Congress, to the President of the United States, and to the heads of the departments of the general government.

"Approved February 9, 1853."

It is apparent that, in many respects, the Treaty of 1854 is directly responsive to the concerns raised by the Michigan Legislature in its 1853 Joint Resolution which requested abandonment of the removal policy under the 1842 Treaty, establishment of permanent reservations, and performance of annuity provisions thereunder. While not before the Courts below, this 1853 Resolution constitutes contemporary evidence of the "'surrounding circumstances'" which with other evidence, aids in determining intent. See *Rosebud Sioux Tribe v Kneip*, 430 US 584, 587 (1977).

It is submitted that this resolution, transmitted to the President, Congress, and the Commissioner of Indian Affairs, a year and a half before the 1854 treaty was negotiated with the Chippewa, lends additional, significant support to the holding of the District Court that

"The evidence strongly implies the parties' contention that the 1854 treaty would extinguish the general Indian claim of a right to occupy, and hunt, fish and otherwise obtain food on the earlier ceded lands. That general intention is not inconsistent with the specific intention the Gurnoe court [*State v Gurnoe*, 53 Wis 2d 390; NW2d 892 (1972)] inferred from the 1854 treaty to allow Indians special hunting and fishing rights on certain limited parts of the ceded territory adjacent to their reservations when it appears that the reservations were located so as to give the Indians access to the adjacent resource." (146a).

RELIEF SOUGHT

For the foregoing reasons, this Court should accord plenary consideration to this appeal, or, alternatively, treat it as a petition for a writ of certiorari and grant the writ.

Respectfully submitted,

FRANK J. KELLEY

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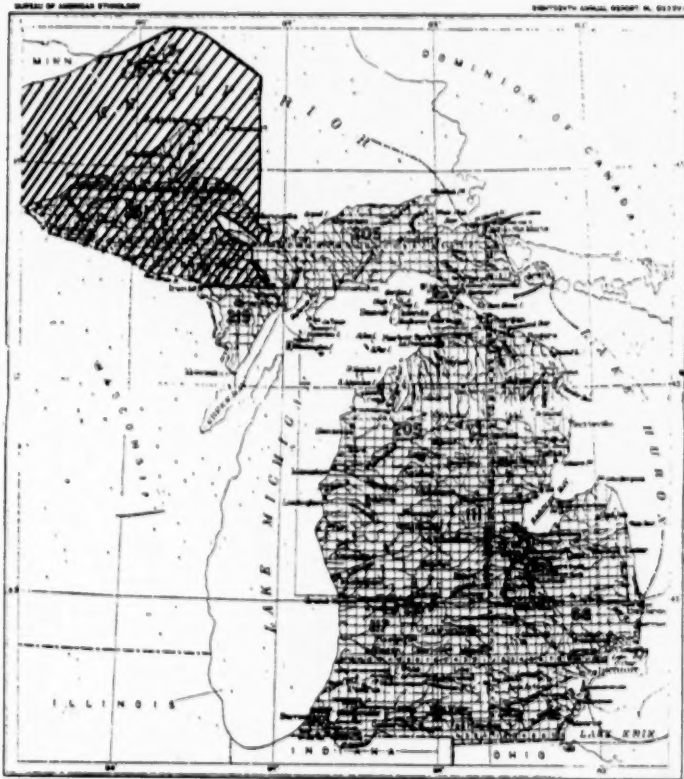
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July 13, 1983

ATTACHMENTS

1. Michigan cession of Chippewa under Treaty of 1842 (Bureau of American Ethnology, 18th Annual Report, Plate 136).
2. Joint Resolution No. 15, Michigan Legislature, 1851 Public Laws, pp. 258-259.
3. Joint Resolution No. 17, Michigan Legislature, 1853 Public Laws, pp. 203-206.

ATTACHMENT 1



**SHADED AREA: MICHIGAN LANDS
CEDED IN TREATY OF 1842**

ATTACHMENT 2

1851 Public Laws of Michigan

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RESOLUTIONS

[No. 15]

JOINT RESOLUTION relative to the Ottawa and Chippewa Indians.

Whereas, The constitution of the State of Michigan gives unto all civilized persons of Indian descent equal rights and privileges with the white inhabitants of said State;

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And Whereas, By the adoption of said clause in the constitution, the people of this State have evinced a just and humane desire to see the Indians who now inhabit Michigan, raised from a state of semi-barbarism to one of enlightenment, and have by it removed one great barrier that has hitherto prevented the consummation of this philanthropic object;

And Whereas, The Ottawa and Chippewa Indians residing amongst us, are a civil, well-disposed, peaceable and orderly people, and have, during the few past years, made great advancement in the agricultural and mechanical arts, and a large portion of them ardently desire to remain in Michigan, to become civilized, and share with us in our social, political and religious privileges; therefore,

Be it resolved by the Senate and House of Representatives of the State of Michigan, That we do hereby request the government of the United States to make such arrangements for

ATTACHMENTS 2 AND 3

said Indians as they may desire, for their permanent location in the northern part of this State, under such provisions in regard to schools, churches, agricultural and mechanical arts, as will the best promote their present and future welfare, and adjust all matters of right and equity that may now be in dispute between said Indians and said government, in a spirit of just liberality.

Resolved further, That the Governor be and he is hereby requested to forward a copy af the foregoing preamble and joint resolution to the President of the United States, to the Hon. the Secretary of the Home Department, to the Hon. the Commissioner of Indian Affairs, and to each of our Senators and Representatives in Congress.

This joint resolution shall take effect immediately.

Approved April 7, 1851.

ATTACHMENT 3

1853 Public Laws of Michigan

RESOLUTIONS

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[No. 17]

JOINT RESOLUTION relative to the Chippewa Indians of Lake Superior.

Whereas, By articles of treaty made and concluded at La Pointe, of Lake Superior, October fourth, eighteen hundred and forty-two, between the United States and the Chippewa Indians of the Mississippi and Lake Superior, the country occupied by said Indians was ceded to the United States, and in consideration of said cession, the United States engaged "to pay the Chippewa Indians of the Mississippi and Lake

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Superior, annually, for twenty-five years, twelve thousand five hundred dollars in specie; ten thousand five hundred dollars in goods," and other payments, and to provide certain officers, schools, &c., for said Indians;

And whereas, It also provided by said treaty that said annuities "shall henceforth be equally divided among the Chippewas of the Mississippi and Lake Superior, party to this treaty, so that every person shall receive an equal share," which said annuities to that portion of said Chippewas residing in the Lake Superior district have heretofore, until about two years past been paid at La Pointe, of Lake Superior, and for the past two years have not been paid to said Chippewas of Lake Superior, in consequence of their great distance from the present point fixed for said payments, at Sandy Lake, near the headwaters of the Mississippi, which point they are unable to reach, and return to their homes on Lake Superior before the rigors of winter have barred their passage;

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And whereas, It is believed the cause of the change in place of payment on the part of the United States, is owing to the desire of the general government to hasten the removal of said Chippewas of Superior, to lands not ceded in said treaty, the policy and propriety of said removal being, in our opinion, based upon the belief which has gained strength from the usual degeneration of the habits of Indians at the approach of civilization, that they are unfitted to become useful citizens, and their presence pernicious to the promotion of morality, christianity, and the arts and improvements of civilized life;

And whereas, That portion of said Chippewas embraced in said treaty, now settled at L'Ance and vicinity, on Lake Superior, in the State of Michigan, who have been unable to receive their share of said annuities for the past two years, for the reasons aforesaid, now number upwards of one hundred

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families; have abandoned the wandering habits and war-like pursuits which characterize the red men of the forest, for the peaceful occupations and christian precepts of the white man; have learned our language and our laws, and cordially yield obedience thereto; have accepted the boon tendered to them by the people of the State of Michigan, on the adoption of its constitution, by disbanding their organization in tribes, and becoming electors under that constitution; have exercised the right of suffrage in a manner which shows their intelligence and discrimination, and their fitness for the enjoyment of the high privileges of American citizens; have purchased and become the actual and legal owners of tracts of land to the amount of about one thousand acres, upon which they now reside, and much of which they have cultivated and improved; have learned and are now in the constant practice of the arts of husbandry and the mechanic arts; raise a considerable amount of stock, grains and vegetables, which have become indispensable to the operatives in the mining districts of Lake Superior; have established schools, in which the English language, and the ordinary routine of an English education are taught to their youth; have erected school houses and churches, and have become moral, industrious, sober and useful inhabitants, having an ardent desire to remain in peace and social harmony with the citizens of the Upper Peninsula of Michigan, and there to receive the share to which they are entitled under the treaty aforesaid;

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And whereas, The citizens residents in their vicinity unanimously desire that the Chippewas aforesaid should remain among them, and have petitioned, in accordance with the desire of said Indians, that their annuities should be paid them at L'Ance, on Lake Superior;

And whereas, The payment of said annuities at that place

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can be made more economically to the General Government than at Sandy Lake, and requiring said Indians to go from their homes at L'Ance to the place of payment, would not only cause them great loss of time, and much embarrassment, delay and expense, but would also tend to efface from their minds the salutary precepts of their instructors, and to lead them from their present habits of sobriety, temperance, and industry, to their original wandering habits, and to irregularities and intemperance, from the contaminating influence of the example of their red bretheren, who are not, like them, improved in the arts and virtues of civilization;

And whereas, By requiring said Indians permanently to remove from their residence, they would be obliged to abandon their farms, school houses, and churches, and their instructors would be brought into the vicinity of their natural enemies the Sioux, and into permanent contact with their bretheren who have as yet made little improvement; and such removal would evidently tend to degenerate them, and cause them to return to their former state, and to the pursuits of savage life;

And whereas, It is understood that the general government has dispensed with the farmer, blacksmith, carpenter, and school, and sold the oxen heretofore provided for said Indians, under the treaty aforesaid, and for the purpose, as is believed, to hasten their removal from their present residence; which provisions in said treaty are now not only useful but necessary for the continued improvement of said Indians;

And whereas, In the opinion of the Legislature, the payment of said annuities, and the restoration of said officers, school, and oxen, without requiring the removal of said Indians, is manifestly equitable, would tend to bind them with the strong cords of love and affection to the white population, to our government, to the cause of education, and the divine precepts of morality and christianity, which are the foundation

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of our political strength, preserving uncontaminated by ignorance and vice the purity of our political principles, and the permanency of our free institutions, and would tend, in some small degree, to mitigate the wrongs of an injured race, second to none in the exalted attributes of magnanimity, generosity, and gratitude, but whose destiny has seemed to be to retire at the approach of enterprise, and disappear as civilization advances; therefore

Resolved by the Senate and House of Representatives of the State of Michigan, That our Senators and Representatives in Congress be earnestly requested to make the necessary applications, and to urge the passage of such laws as may be requisite to provide for the payment to the Chippewa Indians, now residing at L'Ance and vicinity, on Lake Superior, of their pro rata amount of the annuity guarantied to them by the treaty made between the United States and the Chippewa Indians, October fourth, eighteen hundred and forty-two, and that they may not be required to remove from lands selected, purchased, and owned and occupied by them, or from their present residence, at and near L'Ance aforesaid; and that the annuities now due them, and hereafter to become due to them, may be paid at L'Ance, on Lake Superior; and the offices of farmer, blacksmith, and carpenter, and their school and oxen be restored to the Indians aforesaid.

Resolved further, That the Governor of this State be requested to forward copies of these resolutions to our Senators and Representatives in Congress, to the President of the United States, and the heads of the departments of the general government.

Approved February 9, 1853.